REPORTS OF CASES

ARGUED & DETERMINED

IN THE

SUPREME COURT OF QUEENSLAND

WITH

TABLES OF CASES AND INDEX.

BY

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GENERAL PREFACE.

THE absence of any authorised reports of the decisions of the Supreme Court, from the foundation of the Colony to the year 1876, has led to the publication of these volumes. Many important decisions were given during that period, and are reported in the columns of *The Brisbane Courier* and *The Government Gazette*. The compilers of this series have freely availed themselves of those reports. They have also had access to the papers filed in the Supreme Court, and the Judges' note books, and with the assistance obtained from these sources, have made an effort to render the reports as accurate as possible.

The cases have been selected with a view to their present value. Some of the decisions do not now altogether apply, but the whole report has in each instance been printed as containing useful points.

The series, of which this is the first volume, will embrace the leading judgments delivered during the period extending from the foundation of the Colony to the end of year 1880, when the *Queensland Law Journal* was first published, and will include the more important cases reported in Beor's Reports (1 Q.L.R.)

The compilers tender their thanks to Mr. Justice Cooper, the Brisbane Newspaper Company, and the Committee of the School of Arts, for permission to use the volumes of the *Courier* in their possession; to the Officers of the Supreme Court for assistance in obtaining access to the records; and to Mr. D. J. R. Watson, Barrister-at-Law, for assistance in transcription.

BRISBANE,
30th April, 1898.

JUDGES OF THE SUPREME COURT:

SIR JAMES COCKLE, CHIEF JUSTICE,
Appointed 21st Feb., 1863.

ALFRED JAMES PETER LUTWYCHE,
Appointed 21st Feb., 1859.

ATTORNEYS-GENERAL:

RATCLIFFE PRING	... ...	10th Dec., 1859, to 30th Aug., 1865.
JOHN BRAMSTON	... ...	31st Aug., 1865, to 11th Sept., 1865.
CHARLES LILLEY	... ...	11th Sept., 1865, to 20th July, 1866.
RATCLIFFE PRING	... ...	21st July, 1866, to 7th Aug., 1866.
CHARLES LILLEY	... ...	7th Aug., 1866, to 15th Aug., 1867.
RATCLIFFE PRING	... ...	15th Aug., 1867, to 25th Nov., 1868

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SUPREME COURT REPORTS.

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Lutwyche, J.

Habeas corpus—Remand of prisoner where the Court has no jurisdiction to try offence—Corpus delicti—Arrest of prisoner on suspicion of a felony committed beyond the territorial limits of the colony—Comity of nations—Delivery up of fugitives from justice—Extradition—2 Vic., No. 11—6 and 7 Vic., c. 34, ss. 2, 3, 4, 5, 6, 9—16 and 17 Vic., c. 118.

A constable has no power to arrest a person on suspicion of having committed a felony beyond the territorial limits of the colony, unless such felony be supposed to have been committed upon the high seas and within the limits of the Admiralty jurisdiction of the Supreme Court of Queensland.

If an arrest appears to have been improperly effected, the Court cannot remand a prisoner, unless there be some offence committed by him within the jurisdiction of the Court.

Independent of special compact, no state is bound to deliver up fugitives from justice upon the demand of a foreign state, and there is no rule of the law of nations which requires the Supreme Court of Queensland to assist the police of a foreign dominion in bringing offenders to justice.

APPLICATION by William King for his discharge on the return to a writ of *habeas corpus*.

Blakeney appeared for the prisoner.

Pring, A. G., to oppose the application.

The facts and arguments appear sufficiently in the judgment.

25th March, 1860.

R. v. King, *Ex parte* King. Lutwyche, J.

Lutwyche, J. A rule *nisi* having been obtained in Chambers for a *habeas corpus* directing the keeper of the gaol at Brisbane to bring up the body of William King, in order that he might be discharged from custody, on the first day of the present Term he was accordingly brought into Court, and the return made by the gaoler was that King had been committed to his custody by virtue of a warrant of remand signed by two justices of the peace in and for the Colony of Queensland, and setting forth that King had been charged before them with felony, and that it had appeared to them to be necessary to remand him; and that the said warrant commanded the gaoler to receive King into his custody, and there keep him until the 25th day of February, when he was thereby commanded to have King at the Police Office, Brisbane, at 10 o'clock in the forenoon, before the said justices, or before such other justice or justices of the peace for the said Colony as might then be there, to answer further the said charge. The depositions taken before the justices were also returned, and from them it appeared that King was taken into custody by the Chief Constable of the Brisbane Police, on the 17th February, 1860, on suspicion of having caused the death of one Nicholas Deer, at Maryland, in the Colony of New South Wales, by inflicting a wound on his body with shears, or some such instrument, on or about the 25th November, 1859. It appeared also that he had been committed by the Warwick Bench of Magistrates to take his trial for the offence at Brisbane, and that at the Brisbane February Assize he had been discharged by the order of the Judge, upon the statement of the Attorney-General that he had no charge to make against the prisoner, on account of want of jurisdiction.

Mr Blakeney was heard on King's behalf, and the Attorney-General argued the case on the part of the Crown, citing the dictum of Heath, J., in *Mure v. Kay* (4 Taunt. 43): Burn's Justice, Tit., *Habeas Corpus; Ex parte Krans*, (1 B. & C., 258, 2 D. & R. 411); *Rex v. Marks* (3 East. 157); *Ex parte Scott*, (9 B. & C. 446, 4 M. & R. 361). On account of the great importance of the question, the Court took time to consider and prepare a written judgment, which I shall now deliver.

I am of opinion, in the first place, that no constable has power to arrest any person on *suspicion* of his having committed a felony beyond the territorial limits of the colony, unless such felony be

supposed to have been committed upon the high seas, and within the limits of the Admiralty jurisdiction of the Supreme Court. The cases which establish, in general terms, that a constable may without warrant arrest a person upon a reasonable suspicion of felony (See *Davis* v. *Russell*, 5 Bing., 354, 2 M. & P., 590; *Beckwith* v. *Philby*, 6 B. & C., 635., 9 D. & R. 487) will not be found to support, if carefully examined, the universal application of the rule. The "great original and inherent authority with regard to arrests" (4 Steph. Comm., 359), which a constable undoubtedly possesses, is limited by the boundaries of the state or dominion in which he holds his office. If the law were otherwise, the power of arrest on suspicion might become, in this part of the globe, an engine of the most grievous oppression. It is clear that if such a power exists, in reference to felonies committed out of the colony, it might be exercised wherever a felony has been committed, or is supposed to have been committed, in any part of the British Empire, to say nothing of the dominions of foreign powers. Is a man, then, to be arrested and committed to gaol in this colony because the constable has received information which leads him to suspect that his prisoner was concerned in some felony at Delhi or British Columbia? And, if committed to gaol, how long is he to be kept there? This Court would not have any jurisdiction to try him for the offence. Is he to abide in gaol until the authorities of some distant portion of the Empire have been communicated with, and have signified their intention to remove him at the first convenient opportunity? Common sense, which is very often found in the closest alliance with the law of England, revolts at the suggestion of imprisoning a man for twelve or eighteen months before trial; yet, if the imprisonment be designed to insure his being brought to trial, as long, or even a longer interval would occasionally elapse.

It was contended, however, on the part of the Crown, that, assuming the caption to have been improperly effected, yet if a *corpus delicti* appear on the depositions, the Court will remand the prisoner. But what is meant by a *corpus delicti*? My opinion is clear that it can only apply to some offence committed within the jurisdiction of the Court. From the depositions it appears that the felony with which King stood charged before the justices was committed in Maryland, then and now within the colony of New South Wales, on the 25th November last. Upon the proclamation of the Queen's letters patent on the 10th December following, the district of Moreton Bay was separated from New South Wales, and became a distinct

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dominion under the name of Queensland. An appeal no longer lies from its Supreme Court to the Supreme Court at Sydney, and the concurrent jurisdiction within twenty-five miles of each side of the border line with which the Judges of each Court were invested, has, by force of the Act of Separation, been abolished. The offence charged is shown, therefore, to have been committed within a foreign dominion, and as, according to the common law of England, "criminal offences are considered as altogether local, and are justiciable only by the Courts of that country where the offence is committed," (See "Wheaton's Elements of International Law," 6th Ed., 1857, p. 175), King can only be tried by the Court of New South Wales; and no such *corpus delicti* appears on the face of the depositions as would justify this Court in remanding the prisoner to custody.

The Court was pressed by the Attorney-General to remand the prisoner on another ground, viz.:—The obligation imposed by the law of nations to assist in bringing a criminal to justice, and he relied on a dictum of Mr. Justice Heath, who, in the case of *Mure v Kay* (supra), is reported to have said:—"It has been generally understood that wheresoever a crime has been committed, the criminal is punishable according to the *lex loci* of the country against the law of which the crime was committed; and by the comity of nations, the country in which the criminal has been found, has aided the police of the country against which the crime was committed in bringing the criminal to punishment. In Lord Loughborough's time, the crew of a Dutch ship mastered the vessel and ran away with her, and brought her into Deal; and it was a question whether we could seize them and send them to Holland; and it was held we might. And the same has always been the law of all civilized countries." The reputation of Taunton, as a reporter, does not stand very high, and it is, therefore, possible that he may have misunderstood what fell from the learned Judge, and have stated too broadly the general proposition. Of the grounds of the decision in the particular case referred to, we are not informed; but it may be observed that there may be Acts within the competency of a sovereign state which could not be constitutionally undertaken by a dependent dominion like a colony. At all events, whatever may be the value of the precedent in a case of piracy, it does not establish the position that, "by the comity of nations, the country in which the criminal has been found, has aided the police of the country against which the crime was

committed in bringing the criminal to punishment." On the contrary, both *a priori* reasoning and the evidence of indisputable facts point to the conclusion that such an obligation has not yet been imposed by that code which we call the law of nations. A much higher authority than Mr. Justice Heath—I refer to that distinguished publicist, Mr. Wheaton—states the question thus: He says (pp. 176-7), "The public jurists are divided upon the question how far a sovereign state is obliged to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign state, or of its officers of justice. Some of these writers maintain the doctrine that, according to the law and usage of nations, every sovereign state is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the Government of that country within whose jurisdiction the crime has been committed. Such is the opinion of Grotius, Heineccius, Burlamaqui, Vattell, Rutherforth, Schmelzing, and Kent. According to Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfield, Schmaltz, Mittermeyer, and Heffter, on the other hand, the extradition of fugitives from justice is a matter of imperfect obligation only; and though it may be habitually practised by certain states, as the result of mutual comity and convenience, it requires to be confirmed and regulated by special compact, in order to give it the force of an international law; and the last mentioned learned writer considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated states, such as the Germanic Confederation, and the North American Union, this obligation is limited to the cases and conditions mentioned in the federal compacts. The negative doctrine, that, independent of special compact, no state is bound to deliver up fugitives from justice upon the demand of a foreign state, was maintained at an early period by the United States Government, and is confirmed by a considerable preponderance of judicial authority in the American Courts of Justice, both state and federal."

The "negative doctrine" thus maintained in the United States has been tacitly recognised of late years by England, France, and Prussia, who have entered into treaties with the United States for

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the extradition of criminals charged with certain specified offences. A treaty has also been made between England and France for the same object, and the Acts of the Imperial Parliament, 6 and 7 Vict., c. 75 and c. 76, were passed to carry into effect the conventions with France and the United States for that purpose. By entering into treaties on the subject, each of these powers has, I conceive, admitted that a special compact was necessary to obtain the object desired; by limiting the scope of the treaty to a certain class of offenders, each country practically asserted its right to afford an asylum to all other fugitives from justice. Political offences affect as much as any other, sometimes much more, the general peace and security of society; yet, it is well known that England has never felt herself obliged, by the comity of nations, to assist the police of the country against which the political crime was committed in bringing the criminal to punishment, even though the crime amounted to high treason.

Enough, then, has been said to show that a constable cannot arrest any person on suspicion of a felony committed beyond the limits of the dominion to which he himself belongs; that the Court cannot remand the prisoner when it has no jurisdiction to try him for the felony alleged to have been committed; and that there is no rule of the law of nations which requires the Court to assist the police of a foreign dominion in bringing offenders to justice. There are, however, two enactments, one a Colonial Act of Council, the other an Imperial Statute, which must be noticed, inasmuch as the former (2 Vict. No. 11, Call. 501) bears out the view taken by the Court, and shows specific legislation on the subject to have been considered necessary; while the latter (6 & 7 Vict., c. 34, amended by 16 & 17 Vict., c. 118) points out the course which ought to have been adopted in the present case, and which must be pursued in future.*

The object of the Colonial Act, 2 Vict., No. 11, is well indicated by its title, "an Act to facilitate the apprehension of offenders escaping from the Island of Van Dieman's Land, or from South Australia, to the colony of New South Wales." It is unnecessary to recapitulate its provisions, as the Act itself has been virtually repealed by the Imperial Act subsequently passed, 6 & 7 Vict., c. 34. That Act, which was not mentioned during the argument, now extends to all felonies (see 16 & 17 Vict., c. 118), and the sections material to

* See now 44 and 45 Vic., c. 69 (P. & W. 3122).

the present matter are sections 2, 3, 4, 5, 6, and 9. These sections are set out at length in Oke's Magisterial Synopsis, 6th Ed., 1858, pp. 640-645, and it will be seen that, while they effectually provide for the apprehension of offenders flying from justice, they also furnish ample safe-guards for the liberty of the subject. No person who has committed a felony, not triable by this Court, can be arrested in the colony of Queensland, except a warrant against him has first been issued by some person or persons having lawful authority to do so. This warrant must be brought to the Judge of the Supreme Court, who is to require proof on oath or affidavit that the seal or signature in the warrant is the seal or signature of the person whose seal or signature the same purports to be. On such proof being given, the Judge is to endorse his name on such warrant, which warrant, so endorsed, is to be a sufficient authority to the person or persons bringing such warrant, and also to all persons to whom such warrant was originally directed, and also to all peace officers of the place where the warrant shall be so endorsed, to execute the same within the jurisdiction of the Judge, by apprehending the person against whom such warrant was directed, and to convey him before a magistrate, or other persons having authority to examine and commit offenders for trial in this colony. The magistrate is then authorised, upon such evidence of criminality as would justify his committal if the offence had been committed in Queensland, to commit the offender to prison until he can be sent back to that part of her Majesty's dominions in which he is charged with having committed such offence; and immediately upon his committal, information thereof, in writing, under the hand of the committing magistrate, accompanied by a copy of the warrant, is to be transmitted to the Governor of the colony. The Governor may then, by warrant, under his hand and seal, order the person so committed to be delivered into the custody of some person or persons, to be named in his warrant, for the purpose of being conveyed into that part of her Majesty's dominions in which he is charged with having committed the offence, there to be dealt with in due course of law; and if the person so committed to gaol be not conveyed out of the colony accordingly, within two calendar months after his committal, he may, on application to the Judge, be discharged.

The result of the present application is that the Court holds the prisoner to be entitled to his discharge.

R. *v* ROYDS, *Ex parte* SIDNEY.

1860.
23rd February.
1st March.
Lutwyche, J.

Police Act of 1855 (19 Vic. No. 24), s. 19—Resistance of constable in the execution of his duty—Defective warrant of distress—13 Vic., No. 29, s. 69—14 Vic., No. 43.

It is the duty of a constable to execute a warrant of distress even though he knows it to be defective; and a person resisting a constable in executing a defective warrant of distress is liable to conviction under s. 19 of 19 Vic., No. 24.

APPLICATION by John Sidney to make absolute an order *nisi* for a writ of prohibition against C. J. Royds and other justices, and James Shelton, prosecutor, restraining further proceedings on a conviction by the said justices of the said Sidney under 19 Vic., No. 24, s. 19.

The facts and arguments appear sufficiently in the judgment.

Blakeney appeared for applicant, to move the rule absolute.

Pring, A. G., to shew cause.

The facts and arguments appear sufficiently in the judgment.

C. A. V.

1st March, 1860.

LUTWYCHE, J. John Sidney had been convicted under the Act 19 Vic., No. 24, s. 19 (*), of resisting a constable in the execution of his duty. A rule *nisi* for a prohibition was subsequently obtained, upon the ground that the warrant of distress under which the constable acted was informal, not having been made returnable therein within fourteen days from the date of the warrant, as required by 13 Vic., No. 29, sec. 69, under the authority of which the distress warrant was issued. The Attorney-General,

(*) 19 Vic., No. 24, s. 19. Every person who shall assault, resist, or interrupt any sheriff's bailiff, bailiff of the court of requests, or any keeper or other officer in the discharge of any public duty, or any bailiff or keeper distraining for rent or for rates and taxes, or shall rescue or attempt to rescue any property levied or distrained on, shall, for every such offence, forfeit and pay in a summary way before any justice of the peace any sum not exceeding ten pounds, or it shall be in the discretion of the justice before whom such conviction shall take place to commit the person to one of Her Majesty's gaols for any term not exceeding six months, with or without hard labour. Provided always that if the justices hearing the case shall think the same a proper case to be sent to a superior Court to be dealt with, such justice shall be at liberty to commit such person to take his trial for such offence.

who appeared to support the conviction, contended that the warrant followed the form given in the schedule to the Act 11 and 12 Vic., c. 43, and as this statute had been adopted by the Act of Council, 14 Vic., No. 43, the provision in the 69th section of the Act 13 Vic., No. 29, as to making the warrant returnable within fourteen days from its date, had been, by implication, repealed. Without expressing any opinion on this point, which I should wish to hear more fully argued before I am called upon to decide it, I think the rule must be discharged. As Mr. Blakeney rightly contended, a party is not criminally responsible for a rescue when the warrant is bad. But the reason is, that by arresting a man's *person* without proper authority a breach of the peace is committed; and that reason does not apply to an illegal distress upon goods. A constable is bound to obey the warrant directed to him, and the remedy of the party grieved is confined to the magistrate, as well, where he has granted the warrant without having jurisdiction, as where the warrant which he has granted is improper (see per Lord Eldon, C. J. in *Price v. Messenger* (2 B. & P. 161, 3 Esp. 96). If, then, it be the duty of the constable to execute the warrant, he must not be obstructed in the discharge of that duty, though the warrant under which he acts may be informal; and the conviction in this case must consequently be upheld.

R. *v.* WHITE, *Ex parte* SIDNEY.

1860.
23rd February.
1st March.

Lutwyche, J.

Criminal proceeding—Justices' refusal to hear evidence—The Licensed Publicans' Act of 1849 (13 Vic., No. 29), ss. 2, 69—17 Vic., No. 6, s. 3—Sale of liquor in quantity not being less than two gallons.

Whenever a statute authorises the imprisonment of an offender against its provisions, whether it be as the primary punishment for the offence, or as punishment in the last resort, the proceedings against him must be regarded as a criminal proceeding.

APPLICATION on behalf of John Sidney for a writ of prohibition against J. C. White and C. Coxen, Justices, and James Shelton, prosecutor, to restrain further proceedings upon a conviction under 13 Vic., No. 29, s. 2, of the said John Sidney.

Blakeney, for applicant, to move rule absolute.

Pring, A. G., to show cause.

R. *v.* WHITE, *Ex parte* SIDNEY.

Lutwyche, J.

The facts and arguments of counsel appear fully in the judgment of the learned Judge.

C. A. V.

1st March, 1860.

LUTWYCHE, J. The applicant had been convicted under the Act 13 Vic., No. 29, s. 2, for selling two bottles of rum, he not then having a publican's general license; and a rule *nisi* for a prohibition was subsequently granted upon the following grounds:—1st. That the justices improperly refused to hear the evidence of the wife of the applicant, which was tendered on his behalf. 2nd. That neither in the information, nor the conviction, was it alleged that the quantity disposed of was less than two gallons.

Cause was shown against the rule on the second day of Term (Thursday, February 23), and it was agreed on both sides that the judgment of the Court, whenever delivered, should be taken as of the Term.

The first point turns upon the meaning of the words in the 3rd section of the Act 22 Vic., No. 7, which provides that nothing in the Act shall render any wife competent or compellable to give evidence for or against her husband in any criminal proceedings. It was contended by Mr. Blakeney, on the part of the applicant, that the proceeding against him under the Act of Council above mentioned was not a criminal proceeding, because the primary punishment contemplated by the Act was a pecuniary penalty. The cases, however, which he cited [*Attorney-General v. Radloff*, 10 Ex 84; 23 L. J., Ex. 240; 10 Jur. 555; *Easton's* case, 12 Ad. & Ell. 645; *A. G. v. Siddon*, 1 C. & J. 220; *Rackham v. Bluck*, 9 Q. B 691], fail to establish this position. In the *Attorney-General v. Radloff*, the Court of Exchequer was divided in opinion whether an information for penalties under the Smuggling Acts, at the suit of the Attorney-General, was a criminal proceeding punishable on summary conviction. No inference is deducible, therefore, either way, from that case. In *Easton's* case, the decision of the Court was, that a person sentenced by two Justices to imprisonment with hard labour, under the Smuggling Act, is in execution in a criminal matter. That case, consequently, does not assist the applicant. The observations of Mr. Baron Bayley, in the *Attorney-General v. Siddon*, merely go to show that an information for penalties at the suit of the Attorney-General is a civil and not a criminal proceeding; and *Rackham v. Bluck* only decides that a proceeding in the Consistorial Court, to recover

penalties against a clergyman for non-residence, is a civil and not a criminal suit. In none of these cases was the pecuniary penalty the *primary* punishment of the offence; it was the *sole* punishment. And I am of opinion—an opinion borne out even by the authorities cited in support of the application—that whenever a statute authorises the imprisonment of an offender against its provisions, whether it be the primary punishment of the offence, or punishment in the last resort, the proceeding against him must be regarded as a criminal proceeding. In *Easton's case* (12 Add. Ell. 648), Lord Denman says "This must be called a criminal matter: the party is sentenced to imprisonment with hard labour, which puts the point beyond a doubt." And in the *Attorney-General v. Radloff* (23 L.J., (Ex.) 248), Mr. Baron Platt, whose judgment was cited in support of the application, puts the distinction between civil and criminal proceedings as turning upon the *liability* to imprisonment. The 69th section of the Act, under which the applicant was convicted, authorises, in the event of non-payment of the penalty imposed, a distress upon the offender's goods, and, in case of the distress being insufficient, imprisonment of his person for a limited period. And the Act, 17 Vict., No. 6, s. 3, empowers the justices, in all cases of conviction under the Act, 13 Vict., No. 29, s. 2, to add imprisonment, in the first instance, to the pecuniary penalty. There can be no doubt, therefore, that this was a criminal proceeding, and the justices properly refused to hear the evidence of the applicant's wife.

The second point is of less importance, and may be disposed of shortly. The objection to the proceedings is that neither the information nor the conviction, based upon the second section of the Act, alleges a matter which is made the subject of exception in the third section, and declares that the quantity disposed of was less than two gallons. It may be worthy of consideration whether such an allegation would be in any case necessary, and whether it would not be incumbent on the party accused to bring himself within the exception, and to show that he, being a person within a proclaimed place, sold a quantity of spirits, not being less than two gallons. But I do not decide that point now. My judgment is founded upon the fact that the proceedings before the convicting magistrates were had by summons, and that in such summons the general nature of the complaint was succinctly stated, pursuant to the proviso in the 69th section of the Act 13 Vic., No. 29. A formal information in writing had been exhibited before the magistrate who issued the summons, but it was not used

R. *v.* WILSON, *Ex parte* FERRET.

Lutwyche, J.

afterwards; and, consequently, the defendant could not have been placed in a worse position than if the complaint had originally been made orally. Credit may be given to the court for knowing enough of the common affairs of life to take cognisance that two bottles of rum fall short of the quantity of two gallons. The summons gave the magistrates' jurisdiction, and in so plain a case every intendment ought to be made in favour of its exercise.

The rule for a prohibition is accordingly discharged.

R. *v.* WILSON, *Ex parte* FERRET.

1860
30th April.

Lutwyche, J.

Prohibition—Illegally branding—17 Vic., No. 3, ss. 3, 10—Costs against justices.

A conviction under sec. 6 of 17 Vic., No. 3 of the "illegal possession and branding of a filly" is bad.

Where magistrates retain counsel to support a conviction after the Attorney-General has advised that the conviction cannot be sustained, and a writ of prohibition is granted, they are liable for costs.

MOTION on behalf of John Ferret to make absolute a rule *nisi* for a writ of prohibition against John Kerr Wilson, Henry William Coxen, and William Giles Gordon, Justices, and William Miles, to restrain further proceedings on an order made by the said justices against the said applicant, and to recover from the said justices the costs of the application.

The facts and arguments appear sufficiently in the judgment.

Blakeney, for the defendant, moved rule absolute.

Lilley appeared for the justices, to show cause.

C. A. V.

LUTWYCHE, J. A rule was obtained on the 6th of February last, on the part of John Ferret, calling on the above named justices, and William Miles, to show cause why they should not be prohibited from proceeding on a conviction pronounced against Ferret on the 21st January last, and why a fine of £10 and costs should not be refunded.

The information and conviction (under the Act of Council 17 Vic., No. 3, s. 6), described Ferret's offence as the "illegal possession and branding of a filly," and consequently the information

and the conviction are bad on the face of them, as pointed out in the fourth ground upon which the rule was obtained. The offence described in the section is a "taking, using, or working" of cattle without the owner's consent; but instead of following the words of the Act, as section 10 prescribes, the information and conviction charge an illegal possession and branding, which might indeed be *evidence* of a taking, or using, without the owner's consent, but which is not declared by the Act to be an offence *per se*. The point is so clear that I should not have thought it necessary to deliver a written judgment, if Mr. Blakeney had not applied for the costs of the day against the magistrates, who had retained Mr. Lilley to appear in support of the conviction, after having been officially informed by the Attorney-General that the conviction could not be sustained. The applicant was thereby put to unnecessary expense in employing counsel to support the rule; and if this had not been the first time that the question had arisen, I should have made the rule for a *prohibition* absolute, with the costs of the day to be paid by the magistrates. But it must be distinctly understood that, in future, the magistrates will be visited with costs, if the conviction be quashed, whenever they choose to employ counsel to support their view of the law, after having been informed by the highest legal authority at the bar that the matter is not arguable. Their official position enables them to obtain gratuitously the advice and assistance of the Attorney-General, and if he tells them they have mistaken the law, as all men may do sometimes, they ought to acquiesce, and not oppress a person who has been illegally convicted by putting him to expense which he may not be so well able to afford as themselves. In the present case, however, the rule for a prohibition must be made absolute without costs.

[IN INSOLVENCY.]

In re BIRKMAN, *Ex parte* PICKERING.

1860.
15th October.

Lutwyche, J.

Petition for sequestration—Dismissal of Petition—Costs—5 Vic., No. 17, ss. 13, 16, 17—History of doctrine of rights of parties to costs.

A petition had been filed for the compulsory sequestration of the estate of B, and dismissed with costs, to be taxed in favour of B. and the creditors who shewed cause against the sequestration.

Held, that the costs should be taxed, as between party and party.

If the remedy sought in the Insolvency jurisdiction of the Court is of an equitable nature, costs should be given in accordance with the rules laid down by Courts of Equity. If the remedy be a legal one, costs should be awarded as at law.

REFERENCE by the Registrar for directions as to the principle on which costs should be taxed on the dismissal of a petition for the compulsory sequestration of the estate of Marcus Birkman.

The facts and arguments appear in the judgment.

Bell for the respondent and creditors.

Little for the petitioner.

C. A. V.

LUTWYCHE, J. The petition, in this case, was dismissed with costs to be taxed by the Registrar, in favour of Marcus Birkman and such of his creditors as appeared to shew cause against the rule which had been obtained for the compulsory sequestration of his estate; and the matter now comes before me again, upon a reference at the instance of the registrar, in order that it may be determined upon what principle costs shall be taxed in this and similar cases. Mr. Bell, who represented the parties who had shewn cause against the rule, contended that, as the application had been made to the Court in the exercise of its insolvency jurisdiction, the ordinary practice in that jurisdiction of allowing costs as between attorney and client ought to be followed; while Mr. Lilley maintained that the application was in the nature of a proceeding in Equity, and as it had failed, and the interest of the parties to the rule were adverse, costs should only be allowed as between party and party, according to the general practice in Courts of Equity. The Registrar appears to have inclined to the latter view of the case, and, upon a full con-

sideration of the matter, I am satisfied that the opinion at which he seems to have arrived is correct.

Costs are the creature of statute. At common law neither the plaintiff nor the defendant was entitled to costs. The statute of Gloucester, 6 Ed. I, c. 1, gave costs to the plaintiff, but to the plaintiff only. The defendant was left without any remedy for the expenses to which he had been put, until the passing of the statutes, 23 Hen. 8, c. 15, and 4 Jac. 1, c. 3, by which it is enacted that, in all cases in which a plaintiff would be entitled to costs if he recovered, the defendant should have his costs if a verdict be found for him. Several Acts of Parliament were subsequently passed, regulating the payment of costs in certain cases, and narrowing very much the right of the plaintiff to costs in actions at law.

Courts of Equity appear to have derived their jurisdiction in giving costs, from 17 Ric. 2, c. 6, empowering the Court of Chancery to award costs according to its own discretion; a discretion, however, which is regulated by certain general principles adopted by the Court.

In all matters, therefore, relating to the insolvency jurisdiction of the Supreme Court of this colony, which is a mixed legal and equitable jurisdiction, I must, as it appears to me, when I am asked to give costs, first look to the Insolvency Act, and see if it provides for the particular case under consideration. If the Act is silent, the right to costs will then depend on the character of the application; if the remedy sought be of an equitable nature, costs should be given in accordance with the rules laid down by the Court of Equity; if the remedy be a legal one, costs should then be awarded as at law.

There can be no doubt that the petition was an application to the Court in its insolvency jurisdiction. S. 13 of 5 Vict., No. 17, empowers the Judge, upon the petition of a creditor, under certain conditions specified in the section, to place the estate of an insolvent person under sequestration, until the same shall be adjudged to be sequestrated, or the petition shall be discharged. If the Court afterwards confirms the order for sequestration, the petitioning creditor is entitled, under S. 16, to the costs which he has incurred in prosecuting the proceedings, and he is to be reimbursed out of the first money that shall be received from the estate. But if the order for sequestration be superseded and the petition be dismissed the Act says nothing about the payment of costs to the alleged insolvent, or to any of the other creditors. When, indeed, the petition is unfounded and vexatious, or malicious, the person against whom the petition was

In re MORTON, *Ex parte* GRAY.

Lutwyche, J.

presented, may, by S. 27, on application to the Court, forthwith prove any damage which he has sustained thereby, and may be awarded satisfaction for the damage to an amount not exceeding £200.

As the Act is silent respecting costs, when the petition has been dismissed, the only question which remains to be disposed of is whether costs should be given as between solicitor and client in Equity. The application was undoubtedly in the nature of an equitable proceeding, for it involved incidentally the validity of a deed of assignment, which could only have been set aside by a Court of Equity; and, as there is no common fund in which the parties before the Court are interested, and the rights of the parties are adverse, I think that the costs ought to be taxed in this case as between party and party.

Solicitor for petitioner: *D. F. Roberts.*

Solicitor for respondent and creditors: *J. M. Thomson.*

[IN INSOLVENCY].

In re MORTON, *Ex parte* GRAY.

1860.
18th October.

Lutwyche, J.

5 Vic., No. 17, ss. 12, 34—Proof of debt—Payment without notice of sequestration—Advertisement in Government Gazette.

The publication of a sequestration order in the *Government Gazette* is not a notice of insolvency to all the world.

MOTION to allow a proof of debt by Thomas Gray in the insolvent estate of James Morton.

Bell, for the Official Assignee.

Little, for Gray, a creditor.

The facts appear in the judgment.

C. A. V.

LUTWYCHE, J. A claim was made by Mr. Gray to be allowed to prove in this estate for £29 7s. 7d. on account of goods supplied to Morton before his insolvency; but it was contended by Mr. Bell, on behalf of the Official Assignee, that this claim should be disallowed, and that Gray should be compelled to refund a sum of £29 7s., which he had received from one Bright, a servant of the insolvent, and which sum had been paid by Bright after the date of the order for sequestration. Mr. Little, on the other hand, argued that the

payment was protected by the 12th section of the *Insolvency Act*, 5 Vic., No. 17, as a *bonâ-fide* payment made by Bright on behalf of the insolvent without notice of the sequestration of his estate. Two points raised during the argument appeared to me to be of sufficient importance to induce me to reserve judgment, and I shall now state the opinion at which I have arrived in the matter generally.

I must premise, however, that the claim raised on the part of the Official Assignee, to have the money paid by Bright refunded, does not properly arise at the present stage of the proceedings, which relate only to the sufficiency of the proof offered by Gray in respect of a debt due by Morton, for other goods than those for which Gray received payment from Bright. But, as the intimation of my opinion on the points raised may perhaps render such application unnecessary, it may be convenient to express such an opinion.

There was conflicting evidence as to the person to whom credit was given by Gray for the goods which were forwarded by him to Bright. If the credit was given to Bright himself, *cadit quaestio*, for then Gray had a clear right to look to him for payment, and he has been paid accordingly. It is only upon the assumption that the credit was given by Gray to Morton that the points raised by Mr. Bell could affect the right of Gray to retain the money paid by Bright, and, in expressing my opinion on this point, I must by no means be understood as deciding to whom credit was really given. Assuming, however, that it was given to Morton, we must see how the facts of the case stand, so far as they are material. Morton had ordered the goods to be forwarded to Bright, and had given Gray a promissory note for £49 1s. including in this amount a sum of £20 on account of the goods so ordered. The promissory note became due on the 30th July last, and is unpaid; and before it came due Gray applied to Bright, who resides at the Burnett Inn, for payment of the whole amount due, viz., £29 4s. 6d. On the 1st of August an order is made for the sequestration of Morton's estate for the benefit of his creditors. On the 3rd of August Bright posts a letter to Gray, remitting cheques to the amount of £29 7s. On the 4th August a notice appears in the *Government Gazette* stating that Morton's estate had been placed under sequestration; and on the 6th August Gray received Bright's letter of the 3rd August, and appropriated the cheques in payment of his debt.

Mr. Bell contended that the notification of the insolvency in the *Gazette* was notice to all the world, and that, consequently, Gray must

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be taken to have known that an order had been made for the sequestration of Morton's estate, before the money from Bright came into his hands. But I cannot assent to this proposition. As a general rule the *Government Gazette* is only admissible as evidence *per se* of such acts of state as are usually announced to the public through that channel, such as proclamations and addresses received by the Crown. But in a few cases the Legislature has interposed, and expressly made this paper evidence of certain facts, which are directed to be published in it. Thus, in the statute now under consideration (5 Vic., No. 17), we find in section 34, a direction that, after any estate has been placed under sequestration, notice thereof shall be given in the *Government Gazette*, and that two public meetings of creditors shall be thereby appointed, and it then goes on to enact "and such publication shall be deemed notice thereof to all persons." Other instances will be found collected in Taylor on Evidence (edition 1848), p. 1090. But, unless the case is governed by some special clause in an enactment, evidence must be produced *aliunde* in the usual manner in order to affect a party with notice of the contents of the *Gazette*. No such evidence has been produced in this case. Bright could not have seen the notice before he paid the money, and Gray swears that he did not know that the order had been made for sequestrating Morton's estate before Bright's letter was forwarded; and that between that day and the day on which he received the letter he did not search the *Government Gazette*, or any of the local papers. I see nothing, therefore, in the case which induces me to believe that the payment made by Bright was not made or received in good faith. So far as Bright is concerned, I think that the payment must be taken to be made on 3rd August. In *Adams v. Lindsell* (1 B. & Ald. 681), the Court held that a party who transmits a proposal by letter must be considered as renewing his offer every moment, until the time at which the answer is to be sent, and that then the contract is completed by the acceptance of the offer. I think the principle to be extracted from that decision applies also to payments; but, it seems to me, that the discharge of an obligation must date from the transmission of the money, if accepted, and not from the time of its receipt. The writer has done all that lay in his power by posting the letter, and cannot recall its contents, which must be delivered to the person to whom it is addressed; still, to bring a payment within the protection of the 12th section of the Insolvent Act, 5 Vic., No. 17, both the creditor who receives and the

party who pays must be ignorant of the fact that an order has been made for the sequestration of the insolvent's estate. If Mr. Gray had been made aware at the time he received the money from Bright that Morton had been declared to be an insolvent by the order of the Court, the payment would not have been protected. As the evidence stands, however, I think the payment is protected by the operation of the 12th section.

The proof of the debt of £29 7s. 7d. appears to me satisfactory, and must, therefore, be allowed.

Solicitor for Official Assignee: *D. F. Roberts.*

Solicitor for applicant: *Robert Little.*

FITZGERALD *v.* BOYLE.

1861.
5th, 11th March.
Lutwyche, J.

Public officer—Action for damages arising from action of public officer—Officer acting in judicial or ministerial capacity—Want of jurisdiction—Malice—Judicial notice—Duty of officer, how pleaded.

An action will not lie against any public officer in respect of any undertaking or agreement made by him in his public and official character, even if he contract under seal.

Public officers acting in a judicial capacity are not responsible in damages for an injury to an individual resulting from an act of omission or commission on their part, unless they act advisedly without jurisdiction, or with malice.

Where the duty of a public officer is purely ministerial, an action will lie against him for particular damage occasioned to an individual by a breach of such duty.

DEMURRER by defendant to the declaration in an action by Henry Boyle against Robert Fitzgerald to recover damages arising from a breach of the defendant's duty as the Commissioner of Crown Lands for the district of Maranoa.

The pleadings and the arguments of counsel appear fully in the judgment of the learned judge.

Pring, A. G., for the plaintiff.

Blakeney, for the defendant.

C. A. V.

Fitzgerald v. Boyle.

Lutwyche, J.

11th March, 1861.

Lutwyche, J. By consent of the Attorney-General, who was counsel for the plaintiff in this case, and of Mr. Blakeney, who was counsel for the defendant, the demurrer to the declaration, which was set down for argument on the last day of the First Term, was ordered to be argued before me in Chambers on the 5th day of March instant, the judgment to be taken as of the Term; and on the day appointed the demurrer was so argued accordingly.

The declaration contained five counts. The first count began by reciting that the plaintiff, at the time of the commission of the grievances thereinafter mentioned, was in the lawful possession and occupation of a certain tract of Crown Lands, being a run or runs called "Bungunyah" and "Warroo," situate in the district of Maranoa, which was then part of the colony of New South Wales, and that he was, by virtue of an application duly made by him, and of the acceptance of the same, entitled to a lease thereof from the Crown for a period not expired. The count went on to allege that, at the time before mentioned, there were upon the portion of the said tract of Crown Lands which was tendered for as thereinafter mentioned under the name of "Byan Bunnoo," divers buildings and improvements belonging to the plaintiff; that the defendant was Commissioner of Crown Lands for the district of Maranoa, and that it was his duty *as such Commissioner* not to make or join in making, or to be concerned or interested for his own benefit in, any tender or application to the Government of New South Wales for a lease of any portion of the said tract of Crown Lands to the prejudice of the plaintiff, or to report or represent to the said Government that any portion of the said tract of Crown Lands was open to tender, for a lease or otherwise; but that, on the contrary, it was the duty of the defendant as such Commissioner to report and represent to the Government that no portion of the said tract of Crown Land was open to tender for a lease or otherwise, and that any tender or application for a lease thereof, *or any part thereof*, by any other person than the plaintiff, was objectionable and inadmissible. Breach that the defendant, contrary to his duty in that behalf, made and joined in making, &c., a tender to the Government of New South Wales for a lease of *a portion* of the said tract of Crown Lands under the name of "Byan Bunnoo," by and in the name of one James Robertson; that the said tender was referred by the Government to the defendant as such Commissioner to report thereupon, and that the defendant falsely reported that Robertson's

tender was unobjectionable. The count went on to aver, in substance, that the Government accepted Robertson's tender for "Byan Bunnoo," and authorised him to take immediate possession of it, whereby the plaintiff was deprived of the occupation of that portion of his run, and lost his right to a lease thereof. It also alleged as special damage the payment of large sums of money by the plaintiff in defending his rights.

The remaining four counts of the declaration set out, in the main, the same facts, but with some variations in the mode of stating the duty of the defendant, or his breach of duty, as Commissioner for Crown Lands. The second count was in terms identical with the first, but the breach contained the additional words, "well knowing the premises." The third count did not allege that the defendant had any interest in making the tender, but simply averred that it was made by Robertson, and in the breach the *scienter* was omitted, and it was stated that the defendant *falsely* reported that the tender was unobjectionable. The fourth count was the same as the third with the addition of the *scienter* in the breach. The fifth and last count followed the terms of the fourth till it came to a statement of the duty of the defendant, when it alleged that it was his duty not to report without making due inquiry and investigation to ascertain whether such report or representation was true, and the breach averred that he did report without making such due inquiry and investigation.

The defendant demurred to the whole of the declaration, and assigned the following causes of demurrer:—1. That the said counts respectively did not allege any fact from which the duties in the said counts respectively mentioned could be inferred. 2. That the assertion that such duties existed was not warranted in law. 3. That if any such duties did exist they were duties solely to the Government of the colony, and that breaches of them would not, in any respect, render the defendant liable to an action at the suit of the petitioner.

The first ground of demurrer appears to be so weak that, if it had been the only cause assigned, it would have justified an application to the Judge in Chambers to set the demurrer aside as frivolous. Each of the five counts avers that the defendant was Commissioner of Crown Lands, and that as such he had certain duties to perform. The Court does not take judicial notice of the nature of the duties which devolve upon a Commissioner of Crown Lands. It may be assumed that, as he is a public officer, he has some duties to perform, but a plaintiff who comes before the Court, and complains of a particular

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grievance suffered at the hands of a public officer, must inform the Court what his public duties are, by stating them upon the record; and he must state them, not argumentatively by setting out facts from which the duties may be inferred, but by direct allegation (Stephen on Pleading, 5th Ed. 422). The breach of the public officer's duty, as alleged, is the foundation of the petitioner's right of action, and the document becomes, therefore, material and traversable. The case of *Brown v. Mallet* (5 C.B. 599), which was referred to as bearing on the first ground of demurrer, only shows that where the facts previously stated in the declaration *negative* any legal obligation on the part of the defendant, the allegation of a duty, as resulting from these facts, is useless, and will be rejected by the Court. Wherever the statement of a duty in the declaration is manifestly improper and unfounded, the declaration will be defective in substance, and judgment must be given for the defendant. But how is the Court to collect from the general principles of the law, or otherwise, that the duty of a Commissioner of Crown Lands is *not* such as the petitioner in his declaration alleges it to be? I think that the allegation of duty in the several counts is well pleaded, and that the first ground of objection taken by the demurrer to the declaration was not merely untenable, but scarcely arguable.

The second ground of demurrer seems to have been assigned with as little consideration as the first. Nothing was urged in support of it. No reference was made to any statute, or statutory regulation, or proclamation, to show that the assertions made in the declaration, with respect to a Commissioner of Crown Lands, were not warranted in law. The burden of disproof lay on the defendant, and he failed to point out any reason which might induce the Court to think that the duties which legally devolved on a Commissioner of Crown Lands were not such as they were represented in the declaration. On the other hand, reference was made to a regulation of which the Court is bound to take notice, because it is contained in a proclamation which appeared in the *New South Wales Government Gazette*, dated 1st January, 1848, and has relation to the affairs of government. Among the regulations established thereby, in pursuance of the Order in Council of 9th March, 1847, Chap. 2, sec. 13, is the following:—

"The description of each run tendered for will be forwarded to the Commissioner of the District in which it is situated, with instructions to report whether it comprises any land leased, or under promise of lease, or applied for in any other tender; and, if it does comprise any

such land, that he should state what should be the run for which it shall be competent for parties to tender." The regulations made by the Order in Council, of 9th March, 1847, have, by virtue of the Act 9 and 10 Vic. c. 104, s. 6, the force and effect of law in the Australian colonies; but it may be questionable, notwithstanding the terms of the 13th section of chapter 2 of the Order in Council, whether any of the regulations issued by the Government of New South Wales, pursuant to that section, have a like force and effect. Still, I think the Court is bound to take judicial notice of them on the ground I have already mentioned, and I think I am also bound to presume that the course of official action prescribed by the Government in the regulation above set forth was duly followed. If so, the inference would be strong, if the Court were at liberty to travel out of the record, and to draw inferences from facts in an argument on a demurrer, that the duty of the defendant was substantially what it is alleged to be in the declaration. But it is sufficient to say, in disposing of the second ground of the demurrer, that nothing has been advanced to satisfy the Court that the duties legally devolving upon the defendant, as Commissioner of Crown Lands, are not correctly described in the declaration.

The last and only cause of demurrer which affords room for serious argument affirms, as a proposition of law, that the defendant, being a Government officer, is only responsible to the Government for a breach of duty, and that, if any injury results to a private individual from such breach of duty, an action cannot be maintained in respect of such injury. The language of Dallas, C. J., in delivering judgment in *Gidley v. Lord Palmerston* (3 Brod. & B. 286) would, at first sight, seem to support this proposition to its full extent. His Lordship there says:—"On principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved; and though it is to be presumed that actions improperly brought would fail, and it may be said that actions properly brought should succeed, yet the very liability to an unlimited multiplicity of suits would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself." The language of such a judgment, however, must always be construed by a reference to its subject matter, and it is to be observed that in *Gidley v. Lord Palmerston*, the defendant was sued

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in *assumpsit* for the retired allowance of a retired clerk in the War Office, which the defendant, being Secretary at War, had received, and was authorised to pay over. The rule, as broadly stated by Dallas, C. J., only applies to actions founded on contracts. It is well settled that no public officer is to be charged in respect of any undertaking or agreement made by him in his public and official character (*Macbeath v. Haldimand*, 1 T. R. 172; *Rice* v. *Chute*, 1 East. 578); not even when he contracts under seal (*Unwin* v. *Wolseley*, 1 T. R. 674). But the rule has only a partial application to actions against public officers when sued as wrong doers. In *Henly* v. *Mayor, &c., of Lyme* (5 Bing. 107), Best, C. J. says :—"I take it to be perfectly clear that, if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer." Here, it may be observed, the learned Chief Justice appears to lay down the law too generally the other way. A Judge of a Court of Record is a public officer; yet it is clear law that a judge has immunity in respect of any act of a judicial nature within the general scope of his jurisdiction (see per Lord Mansfield in *Mostyn v. Fabrigas*, Cowp. 172). It used to be considered that the only instance in which an action would lie against a judge by the law of England, was for a refusal by him to put his seal to a bill of exceptions according to the Statute of Westminster the Second. The true ground on which this exceptional liability was founded arose, I apprehend, from this circumstance, that the act which the judge was required to perform was not of a judicial, but of a ministerial character; and this distinction runs through all the cases, subject to this further qualification, that if a judicial officer acts without jurisdiction, he will be liable to an action of trespass, if he knows or has the means of knowing that which constitutes the defect of jurisdiction. (See the judgment in *Calder v. Halkett*, (3 Moo. P C. Cas. 28).

Two comparatively recent decisions furnish apposite illustrations of the rule as thus qualified. In *Linford v. Fitzroy* (13 Q.B. 240), which was an action against a justice of the peace for refusing to take bail on a charge of misdemeanour, the Court of Queen's Bench, after taking time to consider their decision, came to the conclusion that the duty of a magistrate in respect to admitting to bail is purely a judicial duty; and they laid it down that when the duty of the magistrate is not purely and simply ministerial, he cannot be made

liable to an action for a mistake in doing, or omitting to do, anything in execution of his duty, unless he can be fixed with malice. In the case of *Green v. Hundred of Bucclechurches* (1 Leon. 323), which has been frequently cited to show that an action lay against a magistrate for a breach of a ministerial duty by refusing to take examinations under the Statute of Hue & Cry, the point was not actually determined (per Lord Denman, C.J., 13 Q.B. 247).

In the second of the cases above alluded to, the Court of Queen's Bench delivered another considered judgment, holding that a Judge of a court of record is liable, in an action of trespass, for an act done by his command when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends. (*Houlden v. Smith* 14 Q.B. 841). The defendant, in that case, was Judge of the County Court of Lincolnshire (which is a court of record) holden at Spilsby. The plaintiff dwelt, and carried on his business, at Cambridge, out of the district assigned to the Spilsby Court. The plaintiff was sued in that Court for a cause of action which had arisen within the jurisdiction, and judgment was given against him. Afterwards, while the plaintiff still dwelt and carried on his business at Cambridge, a judgment summons, under the 98th section of the Act 9 & 10 Vic. c 95, was issued by the defendant, calling upon the plaintiff to be examined as to his estate and effects. This summons was issued without jurisdiction, for the section directs it to be issued by the County Court, within the limits of which the party shall *then* dwell or carry on his business, which, in this instance, was the County Court of Cambridgeshire. The plaintiff not appearing in answer to the summons, the defendant, as Judge of the County Court at Spilsby, made a minute in the minute book of the Court, whereby it was ordered that the plaintiff should, for contempt in not attending, be committed to Cambridge Gaol for fourteen days, and he was so committed. In delivering the judgment of the Court of Queen's Bench, Mr. Justice Patteson observed:—"That this commitment was without jurisdiction is plain; that the defendant ordered it under a mistake of the law and not of the facts is equally plain; for it is impossible that he could be ignorant that the plaintiff dwelt and carried on his business in Cambridgeshire, the service of the processes having been proved to have been made there." And again, "Although it is clear that the Judge of a court of record is not answerable at common law in an action for an erroneous judgment, or for the act of any officer of the court wrongfully done, not in

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pursuance of, though under colour of, a judgment of the court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction."

Although, however, it appears that the rule, as laid down by Chief Justice Best, with regard to the liability of public officers, has a more limited appearance than the literal meaning of his words would impart, I am of opinion that it strictly applies in all cases where the duty to be performed is merely ministerial. The older authorities on this branch of the subject will be found collected in Comyn's Digest, title *Action upon the Case for Negligence* (*A2*), and *Action upon the Case for Misfeasance* (*A1*). Later decisions uphold this doctrine. I have not been able to find any cases which are inconsistent with it. *Barry v. Arnaud* (10 A. & E. 646), which was cited for the defendant, is a direct authority against him on the fifth count of the declaration. *Barrow v. Arnaud* (8 Q B. 595), which is a decision of the Exchequer Chamber, is to the same effect. In *Jacobsohn v. Blake* (6 M. & G. 919), it was held that the defendants, who were custom-house officers, were not liable in trespass for taking possession of and detaining some goods liable to duty, under a misapprehension that they were prohibited and liable to forfeiture; but it was plainly intimated by some members of the Court that they might have been liable in another form of action if the goods had been detained an unreasonable time. In *Davis v. Black* (1 Q.B. 900), which was an action against a clergyman for refusing to perform the marriage ceremony, the judgment was arrested, after verdict for the plaintiff, upon the ground that the declaration was essentially defective in some particulars which ought to have been averred; but Lord Denman, C.J. observed:—"I am by no means prepared to say that such an action as that might not be maintained upon the declaration raising a proper complaint of a public officer neglecting his duty to the temporal, and it might be said to the very great, damage of an individual. Such a neglect of the duty of a clergyman may be actionable if it be malicious and without probable cause." *Harris v. Baker* (4 M. & S. 27) has been distinguished from the class of cases enumerated, upon the ground that the services of the trustees were gratuitous, but the true line of distinction seems to be that the Act of Parliament under which they were appointed, gave them a discretion as to placing lamps along the road during the night time.

Upon a review, then, of the authorities, it seems clear, in the first place, that an action will not lie against any public officer in respect of any undertaking or agreement made by him in his public and official character, even if he contract under seal; secondly, that public officers, acting in a judicial capacity, are not responsible in damages for an injury to an individual resulting from an act of omission or commission on their part, unless they advisedly outstep the limits of their jurisdiction, or there be proof of malice; and, thirdly, that where the duty of a public officer is purely and simply ministerial, an action will lie against him for particular damage occasioned to an individual by a breach of such duty.

Applying these principles to the case now before the Court, I am of opinion that all the counts of the declaration allege a duty in the defendant for the breach of which he may be made responsible in damages at the suit of the party aggrieved. Divested of the circumstances of aggravation which are alleged in some of the counts, they all aver in substance that it was the duty of the defendant to ascertain and report whether "Byan Bunnoo," as tendered for by Robertson, was or was not comprised in lands in the occupation of the plaintiff. Such a duty is essentially ministerial in its character. The defendant had to report on a matter of fact, and was not invested with any discretion. This duty, in this respect, may be compared to a duty cast upon the sheriff, who is commanded by a writ of *fieri facias* to make of the goods and chattels of the defendant within his bailiwick the amount of the monies recovered by the judgment. If the sheriff falsely returns that the defendant has no goods or chattels within his bailiwick, it is clear law, and has been for centuries, that an action will lie against him for such false return The result is that upon this demurrer judgment must be given for the plaintiff.

Solicitor for plaintiff: *D. F. Roberts.*

Solicitors for defendants: *Little & Browne.*

BARKER *v.* JOHNSON.

1861.
6th, 11th March.
Lutwyche, J.

Foreign judgment—Summons for issue of execution on memorial of foreign judgment—Right of defendant to impeach judgment after memorial filed—19 Vic., No. 12, s. 3—20 Vic., No. 25, s. 13.

On the return of a summons under 19 Vic., No. 12, s. 3 *, founded on a memorial of a judgment of New South Wales, calling on a defendant to show cause why execution should not issue in the Supreme Court of Queensland upon such judgment, the defendant filed an affidavit stating that he had never been served with the writ in the action, either personally or by its having been left at any residence occupied by him.

Held, that a memorial of a foreign judgment is only *primâ facie* evidence that the judgment was obtained in due course of law; that any defence which a defendant might plead on an action of debt on a foreign judgment will be a good answer to an application for the issue of execution under s. 3 of of the Act 19 Vic., No. 12; and that, as the evidence adduced by the defendant raised reasonable doubts as to whether he had received proper notice of the proceedings in the action, the plaintiff was not entitled to the summary relief asked for, which should only be granted in very clear cases.

APPLICATION on behalf of Barker, under section 3 of the Act 19 Vic., No. 12, for leave to issue execution in the Supreme Court of Queensland upon a judgment obtained by him in the Supreme Court of New South Wales against Johnson.

* 19 Vic., No. 12, s. 3. It shall be lawful for any Judge of the Supreme Court of this colony, upon the application of the person in whose favour such judgment, decree, rule, or order was obtained, or his attorney, to issue a summons calling upon the person against whom such judgment, decree, rule, or order was obtained to show cause, within such time after personal or such other service of the summons as such Judge shall direct, why execution should not issue upon such judgment, decree, rule, or order; and such summons shall give notice that in default of appearance execution may issue accordingly, and if the person so summoned does not appear or does not show sufficient cause against such summons, it shall be lawful for any Judge of the Supreme Court, or the said Court, on due proof of such service as aforesaid, to order execution to issue as upon a judgment, decree, rule, or order of the Supreme Court of this colony, subject to such terms and conditions (if any) as to such Judge or Court may seem fit; and thereupon and subject thereto the person entitled to such execution shall have and be entitled to all such process, and to all such rights and remedies for the enforcement thereof; and the person against whom such execution is ordered shall in like manner be entitled to all such protective rights and advantages as they would respectively have been entitled to had such judgment, decree, rule, or order been obtained within the Supreme Court of the colony; and all such proceedings may be had or taken for the revival of such judgment, decree, rule, or order, or the enforcement thereof, by and against persons not parties to such judgment, decree, rule, or order as may be had for the like purposes upon any judgment, decree, rule, or order of the Supreme Court of this colony.

All the facts and the argument of counsel appear fully in the judgment of the learned judge.

Browne, for the applicant.

The defendant, *in person*, showed cause why the application should not be granted.

C. A. V.

11th March, 1861.

LUTWYCHE, J. The defendant in person showed cause on the 6th instant why execution should not issue on a judgment which had been obtained against him in the Supreme Court of New South Wales. The application for a summons was founded on a memorial of the judgment, filed in the Supreme Court of Queensland, under the provisions of the Acts 19 Vic., No. 12, s. 3, and 20 Vic., No. 25, s. 13†; and was supported by an affidavit that the defendant was resident in Brisbane, and had acknowledged himself to be the defendant in the action. The defendant, however, on showing cause, produced an affidavit stating that no writ of summons in the action had ever been served upon him, either in New South Wales, Queensland, or elsewhere; and that, to the best of his knowledge and belief, no such writ of summons had been left at any residence occupied by him. Mr. Browne, who appeared for the plaintiff, contended that the judgment of the Supreme Court of New South Wales was conclusive, and that the Supreme Court of Queensland, by entertaining any objection to the judgment on the score of irregularity in the proceedings, would, in effect, constitute itself a court of appeal from the Supreme Court of New South Wales. He argued also that a summons to show cause was deemed necessary in the first instance, because the party summoned might perhaps be able to show that he was not the defendant in the action, or that the seal of the Court by which the memorial purported to be authenticated was forged, or that the judgment was satisfied; but that a judgment which appeared on the face of it to have been regularly obtained could not be afterwards questioned. I expressed an opinion at the time that the memorial was only *primâ facie* evidence that the judgment had

† 20 Vic., No. 25, s. 13. The provisions of the Act of Council, passed in the nineteenth year of Her Majesty's Reign, entitled *An Act to give further remedies to creditors against persons removing from one Australasian colony to another*, shall be applied in reference to the district of Moreton Bay in the same manner as if the said district were a separate Australasian colony.

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been obtained in due course of law, but as the point was of practical importance, and it had been raised for the first time under the Acts referred to, I consented to reduce into writing the grounds of my decision.

The Act 19 Vic., No. 12 (extended to the district of Moreton Bay by the Act 20 Vic., No. 25, section 13) was passed, as may be collected from the preamble, in order to provide a remedy against the evasion of the judgments of the Supreme Courts of the several Australasian colonies, which the separation of the respective jurisdictions of those Courts, and the propinquity of the several colonies to each other, had greatly facilitated. In addition, therefore, to the right which the plaintiff enjoyed at common law of bringing an action of debt on a foreign judgment, the Legislature gave him the means of obtaining the fruits of his judgment by a summary, inexpensive, and expeditious proceeding. He has only to file the memorial of the foreign judgment, containing certain particulars enumerated in the 2nd section of the Act, and thereupon a summons may be obtained calling upon the defendant to show cause why execution should not at once issue against him. But I conceive that in providing this additional remedy for judgment creditors, this Legislature did not make the memorial of a foreign judgment better evidence of a debt than the judgment itself. Any defence, therefore, that may be pleaded to an action of debt on a foreign judgment will be a good answer to an application under the Act 19 Vict., No. 12. In *Ferguson* v. *Mahon* (11 Ad. and E. 179), which is a leading authority on the subject, and where all the previous cases are collected, an action of debt was brought in the Court of Queen's Bench in England on a judgment obtained in an action of *assumpsit* in the Court of Common Pleas in Ireland. The defendant pleaded that, though the said judgment was in fact obtained by the plaintiff against the defendant, the defendant was not at any time arrested upon, or served with, any process issuing out of the Court of Common Pleas in Ireland, at the suit of the plaintiff, for the cause of action upon which the judgment was obtained; nor had he at any time notice of such process; nor did he at any time appear in the Court of Common Pleas in Ireland, to answer the plaintiff in the said action. Upon demurrer it was argued that if the judgment was in fact open to the objection urged in the plea, it was irregular only, and might have been set aside upon application to the Court in which it was recorded, and that the Court of Queen's Bench in England

were bound to respect it as a valid judgment so long as it stood unreversed. But Lord Denman and the other Judges of the Court of Queen's Bench held, after taking time to consider their decision, that although an Irish judgment was a record for certain purposes, the inquiry was still open, not indeed into the merits of the action or the propriety of the decision, but whether the judgment was passed under such circumstances as to shew that the Court had properly jurisdiction over the party. And as it appeared in that case that the defendant had never had notice of the proceedings, or been before the Court, judgment was given for the defendant.

The affidavit filed by Mr. Johnson does not go so far as the plea in *Ferguson* v. *Mahon*, for it does not state that he never had notice of the proceedings, nor that he did not appear before the Supreme Court of New South Wales. But enough is shewn on the face of the affidavit to raise a strong doubt in my mind whether the judgment was not obtained without giving the defendant any notice of the proceedings; and if reasonable doubt can be entertained on this point, execution ought not to issue under the provisions of the Act, 19 Vic., No. 12, which should only be enforced in very clear cases. It appears that the defendant is resident of Brisbane, and it does not appear that he resided elsewhere. He swears that the writ was never served upon him personally, and that to the best of his knowledge and belief no such writ had ever been left at his residence. I am of opinion, therefore, that the application of the plaintiff for the issue of execution on the judgment must be dismissed. If the judgment was obtained in due course of law, the plaintiff can still enforce it by bringing an action of debt on the judgment. But when the Court is invested with extraordinary powers, more than ordinary caution should be used in their exercise, and I think that most alarming consequences might ensue if I were to hold that the plaintiff in the present case is entitled to the summary remedy which he seeks. In dismissing the application, however, I shall not, under the circumstances, give costs; each party will pay his own.

Solicitors for plaintiff: *Little & Browne.*

FLEMING *v.* TOOTH.

1861.
18th April,
21st May.

Lutwyche, J.

Receiver, appointment of—Evidence on application for appointment—Affidavits of fitness and willingness to act.

On an application for the appointment of a receiver, evidence should be adduced of the personal fitness of the proposed receiver, and of his willingness to act.

MOTION on behalf of the plaintiff for the appointment of a receiver in an action by Joseph Fleming against William Butler Tooth for specific performance of a contract for the sale of a cattle station.

Gore Jones, for the plaintiff, applied that Mr. George Raff might be appointed receiver.

Pring, A. G., took the objection that no affidavit had been filed showing the personal fitness of Mr. Raff, or his willingness to act as receiver in the action.

LUTWYCHE, J. I am of opinion that the objection taken by the Attorney-General is a valid one, and that this application cannot succeed, and must be dismissed with costs.

Solicitors for plaintiff: *Macalister & Scott.*
Solicitors for defendant: *Little & Browne.*

BARTLEY *v.* ROW.

1861.
26th, 29th Nov.
Lutwyche, J.

Bill of sale, construction of—After acquired property—New trial—Verdict against evidence—Wrongful admission of evidence—Interest of juror in verdict as ground for new trial.

By a bill of sale, the mortgagor, a chemist and druggist, "granted, bargained, sold, and assigned" to the mortgagee, all his horses &c., and "all other the stores, goods, chattels, and effects, in, upon, or about the house where the said mortgagor now resides and carries on business, or which, during the continuance of this security, may be in or upon any other premises where the said mortgagor shall reside, or carry on business," and after conferring on the mortgagee, in default of payment of the moneys intended to be secured, a right to take possession of the mortgaged goods and sell, the deed continued "provided always, and it is expressly agreed, that the said mortgagee, his executors, administrators, and assigns, may enter, under the powers hereinbefore contained, into possession of any property of the said mortgagor, which may at any time be on the premises where he may carry on business, whether the same shall actually pass by this deed or not, the intention of these presents being to make any stock or effects hereafter acquired by the said mortgagor, a security to the said mortgagee, whether the same is now in his possession or not." Subsequently to the execution of the bill of sale, the mortgagor purchased goods from third parties, and, default having been made by the mortgagor, the mortgagee took possession *inter alia* of these goods under his mortgage.

Held that, as the authority given by deed to take possession of after acquired property had been rendered complete by an actual taking possession of the goods, the mortgagee could, by the exercise of the power of sale conferred on him by the deed, give a good title to those goods.

Congreve v. Evetts (23 L. J., Ex. 273), followed.

Where, at a trial, evidence had been admitted which was irrelevant, and which tended to distract the minds of the jury from the question of fact which they had to try, and to create in their minds an undue bias in favour of the defendants, a new trial was directed to be had.

On the trial of an issue to decide the ownership of property, one of the jurors was a judgment creditor of a person whose assets would be materially increased or decreased by the result of the verdict. On a motion for a new trial on the ground of the interest of the juror in the verdict, the juror made an affidavit that he was not aware, at the time of the trial, that the verdict could have the slightest influence on his claim against his judgment debtor.

Held, that the interest of the juror in the verdict was not a sufficient ground for a new trial.

Bailey v. Macaulay (13 Q. B. 815), distinguished.

BARTLEY *v.* ROW. MOTION on behalf of the plaintiff to make absolute a rule *nisi* for a new trial of an interpleader issue, between Nehemiah Bartley, of Brisbane, and Messrs. Row, of Sydney, on the grounds (1) that the verdict was against the evidence, (2) that improper evidence had been admitted by the Judge on the trial, and (3) that one of the jury who tried the case was an interested party.

Barnes, who carried on the business of a chemist, in Ipswich, executed a bill of sale over all his effects, in the terms appearing in the judgment of the learned Judge, in favour of George Thorn, as security for money lent. Default having been made in payment under the bill of sale, Thorn exercised his power of taking possession and sale, and sold to the plaintiff, who allowed Barnes to continue on the premises, acting as his agent. Among the goods thus seized and sold by Thorn were goods acquired by Barnes after the execution of the bill of sale. Defendants, who were judgment creditors of Barnes, after the sale of the goods, caused the sheriff to seize the goods under a *fi. fa.* on their judgment. The plaintiff claimed the goods, and the sheriff interpleaded. All the other material facts, and the argument of counsel, appear from the judgment of the learned Judge.

Pring, *A. G.*, for the plaintiff.
Gore Jones for the defendant.

The following cases were cited by counsel:— *Lunn v. Thornton* (1 C. B. 379), *Tapfield v. Hillman* (6 M. & G. 245), *Congreve v. Evetts* (23 L. J. (Ex,) 273), *Petch v. Tutin* (15 M. & W. 110).
C. A. V.

29th November, 1861.

LUTWYCHE, J. This was an interpleader issue directed by the Court, in order that a jury might determine whether certain goods which had been seized under a writ of *fi. fa.*, issued at the instance of Messrs. Row, of Sydney, against one R. M. Barnes, of Ipswich, were the property of the execution creditors, the Messrs. Row, or of Nehemiah Bartley, of Brisbane. The issue was tried before me and a special jury of four persons at the Ipswich Assizes, on Thursday, 7th instant, when the jury found a verdict for the defendants. In the ensuing Term, the Attorney-General obtained a rule *nisi* for a new trial, and against this rule cause was shown on the third and last days of the Term by Mr. Gore Jones, the Attorney-General being heard in support of it. Three grounds were urged in support of the rule. 1. That the verdict

was against the weight of the evidence. 2. That evidence was improperly received by the Judge on the trial of the issue. 3. That one of the jury was interested in the verdict. On the third I desired time to consider, and promised to deliver a written judgment which I now publish accordingly. The parties have agreed to take the judgment as of the Term.

There seems to be no sufficient reason for disturbing the judgment on the first ground. Without entering into particulars, it is enough to say that the argument of the plaintiff's counsel failed to satisfy the Court that the verdict of the Court was demonstrably wrong, although evidence was given which might well have justified a verdict for the plaintiff. When evidence is produced on both sides, it is for the jury to weigh the evidence and give their verdict as the scale, in their judgment, preponderates. If a new trial were to be granted in all instances in which a judge might think that, if he had been on the jury, he would have found a different verdict, the province of the jury to decide questions of fact would be practically absorbed by the judge. It is only in extreme cases that the Court will interfere to set aside their findings, as where the verdict has been obtained by surprise or fraud, or where their finding, upon the facts proved, is so perverse and so shocking to reason and conscience that the verdict could not be allowed to stand without shaking the confidence of the community in the administration of justice.

Upon the second ground, however, I am of opinion that a new trial ought to be granted. The plaintiff rested his claim upon a purchase by him, of the goods in question—the stock-in-trade of a druggist's shop—on the 26th August last. The goods were sold by auction, in pursuance of a power given by a bill of sale executed by Barnes, in favor of George Thorn, as a security for an advance by Thorn of £300. The sum paid by Bartley for the stock-in-trade was £220. It was argued, however, at the trial, that the goods were bought in Bartley's name for Barnes, who was the real purchaser; and after the bill of sale had been given in evidence on the part of the plaintiff, Mr. Jones proposed to ask Barnes, in cross-examination, what goods he had obtained from Messrs. Row, subsequently to the execution of the bill of sale. To this question the Attorney-General objected; and, with the recollection of *Lunn v. Thornton* (1 C.B. 379), and *Congreve v. Evetts* (23 L.J. (Ex.) 273) in my mind, I expressed a strong opinion that the proposed evidence would be inadmissible; but, as I had not the cases at hand, and the

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question was pressed, I allowed it to be put, and it was answered. It appeared from the answer that some goods were supplied by Messrs. Row to Barnes after the bill of sale had been executed. It was urged by Mr. Jones, in showing cause against the rule for a new trial, on the grounds that this evidence had been improperly received, that, even admitting the bill of sale to have operated as a continuing security, the evidence was receivable, with a view to show that Barnes was the party who purchased at auction, inasmuch as he would have a strong interest in buying, for £220, goods which might have been worth £400 or £500. The answer to this argument is that Bartley had as strong an interest in getting a good bargain as Barnes, and, in this point of view, therefore, the evidence, which was calculated to prejudice the jury against the plaintiff's claim, was inadmissible, and ought to have been rejected. But it was further contended by Mr. Jones that the bill of sale given by Barnes to Thorn did not operate as a continuing security, and covered only the stock-in-trade which was in the hands of Barnes when the bill of sale was executed. By that deed Barnes "granted, bargained, sold, and assigned" to Thorn all his horses, etc., "and all other, the stores, goods, chattels, and effects in, upon, or about the house where the said A. M. Barnes now resides and carries on business; *or which, during the continuance of this security*, may be in or upon any *other* premises where the said A. M. Barnes shall reside or carry on business." There was a proviso in the deed that, if the sum of £300 were not repaid by Barnes to Thorn, on demand, it should be lawful for Thorn to take possession of the goods and sell them by private contract or public auction; and a similar proviso in these terms—"Provided always, and it is hereby expressly agreed that the said George Thorn, his executors, administrators, and assigns, may enter, under the powers hereinbefore contained, into possession of any property of the said A. M. Barnes, which may, at any time, be on the premises where he may carry on business, *whether the same shall actually pass by this deed or not*; the intention of these presents being to make any stock or effects, hereafter acquired by the said A. M. Barnes, a security to the said George Thorn, whether the same is now in his possession or not." It was evidently the intention of the parties, therefore, that the assignment should operate as a continuing security, and apply to property afterwards acquired; and, as the express authority given by the deed to take possession of after acquired goods was completed by possession being actually taken before the writ of *fieri facias* was

issued (3rd October), the present case is directly within *Congreve v. Evetts* (*ubi sup.*), recognized and acted upon in the subsequent cases of *Hope v. Hayley* (25 L.J. (Q.B.) 155), and *Carr v. Allatt* (27 L.J. (Ex.) 385). It follows that evidence was admitted at the trial, which was not merely irrelevant to the issue, but which had a tendency to distract the attention of the jury from the question of fact which they had to try, and to create in their minds an undue bias in favour of the defendants.

I am of opinion that a new trial ought not to be granted on the third ground moved by the Attorney-General, viz.:—that one of the jury was interested in the verdict. It appears, from the affidavits filed, that Henry Vivian Hassell, one of the jury, was at the time of the trial a judgment creditor of Barnes; that the plaintiff was not aware of this circumstance at the time, but that his attorney was; and that, since the trial, Mr. Hassell has discontinued the proceedings which he had taken against Barnes, and has commenced a fresh action against him. Mr. Hassell stated in his affidavit that he was not aware that the verdict of the jury could have the slightest influence on his claim against Barnes, and there is not the least ground for questioning the entire accuracy of that statement. But the question remains, was he interested in the result of the verdict or not, at the time he entered the witness box; and I think there can be no doubt he was so interested. The goods had been purchased at auction for £220, and fresh stock had since been supplied by Bartley. The judgment debt of Messrs. Row was, as I collect from the evidence, about £140, and if it were declared by the verdict that Bartley had no claim on the stock-in-trade, there would remain, after the judgment debt of the Messrs. Row had been satisfied, upwards of £80 worth of goods liable to execution at the suit of other judgment creditors of Barnes, one of them being Hassell. The authorities, however, are to a certain extent conflicting upon the propriety of granting a new trial upon the ground that a juror was interested in the result of the verdict. In the most recent case upon the point, *Williams v. Great Western Railway Coy.* (28 L. J. (Ex.) 2), a new trial was refused, and it was held that the remedy of the party was by way of challenge. But the Court of Exchequer expressly guarded themselves from saying that they would not interfere under any circumstances, and it is to be observed that a previous decision of the Court of Queen's Bench, directing that a new trial should be had on the ground of interest in a juror, was not brought under the notice of

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the Court of Exchequer in *Williams v. Great Western Railway Coy.* In *Bailey v. Macaulay* (13 Q. B. 815, 829), an action was brought against a member of a provisional committee of a railway company, and the foreman of the jury by whom the action was tried was a brother provisional committee-man of the same company with the defendant, who had the verdict. "This," said Lord Denman, C. J., who delivered the verdict, "appears to us to be wrong; though he was left on the special jury he ought to have informed the Judge of his peculiar position." But, although the Court granted a new trial in that case, the judgment turned upon the fact that the juryman did not make an affidavit that he did not know that he was about to dispose of interests essentially the same as his own. "We, therefore, cannot help inferring," continued Lord Denman, "that he thought his own interest might be affected by the verdict, and are of opinion that for this defect there ought to be a new trial." Mr. Hassell, however, distinctly denies any knowledge that the verdict could have the slightest influence on his claim against Barnes, and the case is thus taken out of the authority of *Bailey v. Macaulay*. As at present advised I should have no difficulty, were the same circumstances to arise as happened in the last mentioned case, in following the decision of the Court of Queen's Bench rather than that of the Court of Exchequer. It is a well known maxim of law that a judge cannot sit to try his own cause, and the Court of Queen's Bench has repeatedly interfered where magistrates who had an interest in the subject matter of decision have acted in their magisterial capacity (See *R. v. Cheltenham Commissioners*, 1 Q. B, 467; *R. v. Justices of Hertfordshire*, 6 Q. B., 753; *R. v. Inhabitants of Upton St. Leonards*, 10 Q. B. 827). I can see no difference in principle between the position of a judge or a magistrate, in this respect, and that of a juror; and I think it would be desirable, in future, that a juror should state that he is interested when such is the fact. If no objection be made to his serving by either of the parties, he can then sit and try the cause without any risk of suspicion.

For the reasons above stated the verdict ought not to be disturbed upon either the first or third of the grounds moved by the Attorney-General, but upon the second the rule must be made absolute for a new trial.

Solicitor for plaintiff: *Chas. F. Chubb.*

Solicitor for defendants: *J. Malbon Thompson.*

Re CAMPBELL, *Ex parte* MUIR.

1861.
8th October.

Lutwyche, J.

Trustee Act, 1852 (16 Vict., No. 19) s. 9—Vesting order—Sale of land without conveyance—Death of Vendor.

The vendor of land died before executing a conveyance, and the purchaser entered into possession.

Held that the purchaser was entitled to an order vesting the land in him and his heirs, as and for an estate in fee simple.

PETITION for vesting order under s. 9 of 16 Vic., No. 19, by Andrew Muir.

John Campbell, on the 14th April, 1859, sold certain land in Fortitude Valley, Brisbane, to the petitioner. The petitioner paid the purchase money to George Warren, agent for the vendor. The petitioner entered into possession of the said land. Campbell executed no conveyance, and died, leaving a widow and a son.

Carey, in support of the petition, read affidavits disclosing the above facts.

LUTWYCHE, J., made an order directing that the lands mentioned in the petition should vest in the petitioner and his heirs, as and for an estate in fee simple.

PATEN *v.* CRIBB.

Crown grant to joint tenants—Mortgage by one tenant—Insolvency—Partition—Tenants in common.

1861.
17th, 19th Dec.
1862.
7th January.

Lutwyche, J.

A Crown grant was made to two joint tenants, one of whom mortgaged his interest and was subsequently adjudicated insolvent, and the equity of redemption became vested in the official assignee.

Held, that the joint tenancy was severed, and that the other tenant and the official assignee became tenants in common.

A joint tenant cannot forfeit more than his own share in a joint tenancy.

Action by John Paten against Robert Cribb, for a partition of land.

All the facts and the arguments of counsel appear sufficiently from the judgment of the learned Judge.

Carey for plaintiff.

Pring, A. G., and Lilley for defendant.

C. A. V.

7th January, 1862.

Lutwyche, J. In this case the plaintiff, after a lengthy argument on the merits, prayed for leave to amend his bill, not without costs, on the ground that the objection that relief was sought against the wrong parties did not appear on the face of the bill, but was only to be collected from the evidence.

I have looked through the papers, and find the objection apparent on the face of the bill. The facts, so far as they are material to the single point under consideration, are few and simple. By a Crown Grant, dated 14th December, 1858, 45 acres of land, near the confluence of Enoggera and Fish Creeks, in the county of Stanley, being portion 168, were conveyed to the plaintiffs, John Paten, and his son, Philip John Paten, their heirs and assigns, for ever.

The effect of this grant was to vest the land in question, in the father and son, as joint tenants in fee simple. Subsequently the son deposited the title deed of the land with the Secretary of the Moreton Bay Benefit Investment and Building Society (No. 3), and signed, but did not seal, a blank form of mortgage with the object of securing to the trustees of the Society the repayment of a sum of money advanced by them to Philip John Paten, out of the Society's funds.

All that resulted from this transaction was an equitable mortgage by the deposit of the title deed of Philip John Paten's undivided moiety of the 45 acres. Even if the mortgage conveyance had been regularly executed by him he could not have passed the legal estate in the whole land, for, although each joint tenant is said to be seised of the whole, he cannot lien or forfeit more than his own share; and, if all join in a conveyance, each gives but his own part (Litt. 288; Co. Litt. 186a, Burton on Real Property, p. 10). While, however, the legal estate in Philip John Paten's undivided moiety remained in him he became insolvent, and the whole of his estate, title, and interest in the land vested, by operation of the law, on 7th June, 1860, in the Official Assignee, Mr Pickering. The joint tenancy, which had been created, was thereby severed; for it makes no difference, in regarding the severance of the jointure, whether one joint tenant has conveyed away his own share in his lifetime, or whether the law has done it for him. On the 7th June, 1860, therefore, the legal estate in the 45 acres was vested in John Paten, and the Official Assignee, as tenants in common, and, for all that appears on the face of the bill, is still so vested. The bill states, indeed, that, on the 10th August, 1860, the defendant, Robert Cribb, became the purchaser, at public auction, of Philip John Paten's right, title, and interest in the land; but it does not state that a conveyance was executed to Cribb by the Official Assignee. It is not, however, for the Court to declare in whom the legal estate in Philip John Paten's moiety is vested. It is enough, for the purpose of the present decision, to point out that it never vested in the defendant, and that objection is apparent on the face of the bill. The plaintiff's counsel admits that, if the legal estate of Philip John Paten did not pass from him to the defendant, a partition could not be made; and the owner of the legal estate must, consequently, be brought before the Court, in order that the relief sought may be granted. The plaintiff will be allowed to amend his bill as he may be advised, but he can only do so on payment of costs.

R. *v.* NICHOLL.

1862.
6th January.

Lutwyche, J.

11 and 12 Vic., c. 42, s. 25—Committal of accused persons—Justices acting in a ministerial or judicial capacity—Certiorari.

On the hearing before justices of a charge for an indictable offence, the majority of the bench thought that the evidence was insufficient to commit, but the minority committed the accused for trial.

Held, on an application for a writ of *certiorari* to bring up and quash the order of committal, that the committal was irregular, but that as justices in committing an accused person for trial act in a ministerial and not a judicial capacity, a *certiorari* ought not to be granted.

SUMMONS calling upon Charles George Gray, John Murphy, John Panton, G. H. Wilson, and others, Justices of the Peace, to show cause why a writ of *certiorari* should not issue to bring up and quash a warrant of commitment by them of Nicholl for trial.

It appeared from the affidavits that the defendant was charged before justices with an indictable offence, and that a majority of the justices present thought the evidence adduced was insufficient to warrant his committal for trial, while the minority, being of opinion that the evidence was sufficient, committed him for trial accordingly, and afterwards admitted him to bail.

The argument of counsel appears fully in the judgment of the learned Judge.

Lilley for the defendant.

Gore Jones, for the Justices, shewed cause.

LUTWYCHE, J. In this case a summons was taken out, calling upon Charles George Gray, John Murphy, John Paton, G. H. Wilson, and others, Justices of the Peace, to show cause why a writ of *certiorari* should not issue to certify the record and proceedings before them, and why a certain order and warrant of commitment of the defendant for trial should not be quashed. It appeared from the affidavits that the defendant was charged before the said Justices with the commission of an indictable offence, and that a majority of the justices present thought that the evidence adduced was insufficient to warrant the committal of the defendant for trial, while the minority being of opinion that the evidence was sufficient, committed him for trial accordingly, and afterwards admitted him to bail.

I have no doubt that upon the true construction of the Act, 11 and 12 Vic., c. 42, s. 25, the committal of the defendant for trial was an irregular proceeding. The 25th section provides that: "When all the evidence offered upon the part of the prosecution against the accused party shall have been heard, if the justice or justices of the peace *then* present shall be of opinion that it is not sufficient to put such accused party on his trial for any indictable offence, such justice or justices shall forthwith order such accused party, if in custody, to be discharged as to the information then under inquiry; but if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raises a strong or probable presumption of the guilt of such accused party, then such justice or justices shall, by his or their warrant, commit him, etc."

It is clear from the language of this section that the discharge or committal of the party accused is to be the act of the justices present at the time when the evidence for the prosecution has been brought to an end, and that, if a difference of opinion prevails on the bench, the minority must yield to the majority, as is the rule in the superior courts.

Mr. Jones, who appeared for the minority, argued that in order to entitle a party accused to his discharge, the justices must be unanimous; but this argument is disposed of by saying that if unanimity is necessary on the part of the justices, they must be unanimous in committing the defendant for trial, for the language of the section is the same in both cases. I do not wish to be understood as saying that the decision of a majority is to be final, but that it ought to be, and is, conclusive to the information then under inquiry. Further evidence may subsequently be discovered, and a fresh information may be exhibited, so that no failure of justice is likely to ensue.

Admitting the proceedings, however, on the part of the committing magistrates to have been irregular, the question remains whether the defendant has any remedy by *certiorari*, and I think he has not. That writ lies when magistrates act in a judicial, but not when they act in a ministerial capacity. And, notwithstanding an *obiter dictum* of Mr. Justice Coleridge (*R. v. The Overseers of Salford*, 21 L. J. (M. C.), 224), it appears to me from the language used by all the Judges in *Cox v. Coleridge* (1 B. & C. 37), that a justice of the peace, in committing a party accused for trial, does not act in a

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judicial, but in a ministerial capacity. The decision of the magistrates is not conclusive as to the guilt or innocence of the person committed. "He does not act," says Holroyd, J., "as a Court of Justice; he is only an officer deputed by the law to enter into a preliminary inquiry." Before the judicial inquiry can be instituted, the decision of the committing magistrate has to be reviewed by the Attorney-General, as grand jury for the colony. I confess, therefore, that I do not feel much impressed by the argument of Mr. Lilley that the defendant has been exposed to any great hardship by the irregularity which has been committed, nor do I accede to his suggestion that if the *certiorari* be refused, the defendant will be without remedy. I think he has mistaken his remedy, and that if I were to grant this application, and the *certiorari* were to issue, I should establish a very mischievous precedent. I therefore dismiss this application; but, as faults have been committed on both sides, each party must pay his own costs.

WALSH *v.* KENT.

1862.
31st January.

Lutwyche, J.

Master and servant—Ground for discharge from service—Shepherd—5 Eliz., c. 4—9 Geo. IV, c. 83, s. 24.

The Act 5 Eliz., c. 4, is in force in this colony.
A shepherd is a servant in husbandry within the meaning of that Act.

APPLICATION on behalf of W. H. Walsh to make absolute an order *nisi*, calling on John Kent, Police Magistrate at Maryborough, and Patrick Burns, to shew cause why a writ of prohibition should not be granted to restrain further proceedings under an order, made by the said Kent, discharging Burns from the service of Walsh, on the grounds, (1) that the order was made *ex parte* and without notice to the appellant, (2) that the Magistrate had no jurisdiction to make the order, and (3) that the order was irregular in point of form.

The facts appear fully in the judgment of the learned judge.

Lilley moved the rule absolute.

Pring, A. G., showed cause.

LUTWYCHE, J. A rule *nisi* for a prohibition in this case was obtained by Mr. Lilley upon the grounds that an order made by Mr. Kent, Police Magistrate at Maryborough, for the discharge of Patrick Burns, a shepherd, from the service of W. H. Walsh, was made *ex parte*, and without notice to him; that the Magistrate exceeded his jurisdiction in making the said order; and that the order was irregular.

Upon shewing cause against the rule, the Attorney-General produced affidavits which disposed of the first ground on which the rule was obtained. Burns lodged a complaint against his master for an assault, and Walsh having pleaded guilty, the Police Magistrate fined him £1, with 4s. 6d. costs. The order for the payment of the fine was made on the 17th October last, and it appeared from the affidavits filed in opposition to the rule, that immediately after judgment had been given, and before any other business was transacted, Burns applied for his discharge, to which the Police Magistrate had previously stated he was entitled. Walsh was present when the application was made, and had objected to the *dictum* of the Police Magistrate as being contrary to law, as well as to the application itself, which was granted verbally by the Police Magistrate, who told Burns to apply to the Clerk of Petty Sessions for the order of discharge. This order appears to have been formally drawn up, and signed on the following day, for the copy of it is in the following form:—"Police Office, Maryborough, 18th October, 1861, Re Burns *v.* Walsh, *adjudicated on the 17th instant.* The complainant applies for his discharge from the service of W. H. Walsh, of Degilbo, upon the ground of having been assaulted by him. Granted; John Kent, P.M."

Upon these facts, it is quite clear there is no foundation for the first ground set forth in the rule *nisi*. So far from the fact is it that the order was made *ex parte*, and without notice to the defendant, that the defendant objected not only to the order, but to the correctness of the Magistrate's view of the law upon which his decision was founded. The only hypothesis upon which the first ground could be considered tenable is an assumption, though an erroneous one, that no court can be taken to have made an order until the order is formally drawn up, and signed by the proper authority. As a general rule, an order is made from the moment when the decision of the court is pronounced, and even in cases when it is necessary that the order should be reduced to writing, so that it may serve as evidence of an act of jurisdiction, the order is *in fieri* from the instant it has been announced in open

WALSH v. KENT. Lutwyche, J.

Court. I look upon the order of discharge, therefore, as having been made in effect on the 17th October, when the charge of assault had been heard and disposed of, and when the defendant was present, which is sufficient. (See *R. v. Easman*, Strange, 1,013.)

The second ground, stated by the rule, that the Magistrate exceeded his jurisdiction in making the order, involves some difficulty. Burns, it must be borne in mind, was a shepherd, and as such would be a "servant in husbandry" within the meaning of 5 Eliz., c. 4. We must see, therefore, whether that act is in force in this colony, for if it be in operation here, the Magistrate had jurisdiction under it, and might, upon sufficient cause shewn to him, put an end to the service. That an assault would be a sufficient cause is clear. Before the statute, a denial of wages, or of meat and drink, or a battery on the part of the master, was cause for a servant to depart from service (Com. Digest, Justice of the Peace, B. 63), but the statute imposed this restriction on the common law right of a servant in husbandry, viz.: that he should not act upon his own view of the case, but should be required to prove to the satisfaction of a justice of the peace a lawful cause of departure from his master's service, the lawful causes of departure remaining the same as before. By 9 Geo. IV., c. 83, s. 24, it is provided that all laws and statutes in force within the realm of England at the time of the passing of that Act should be applied in the administration of justice in New South Wales; and by the 20th and 22nd sections of the Order-in-Council of 6th June, 1859, it is further provided that all laws, statutes, and ordinances which should be in force in Queensland when the Order-in-Council should come into operation should continue in force until altered or repealed by an Act of the Legislature. The question which arises, therefore, is whether any colonial Act has been passed which, either in express terms or by implication, has repealed the statute 5 Eliz., c. 4.

The first Act which was passed for the better regulation of servants, labourers, and work people, was the New South Wales Act, 9 Geo. IV, No. 9. The preamble recited that "many of the Acts of the British Parliament, relating to servants and labourers, were not applicable to the colony of New South Wales," and various provisions were accordingly enacted, which were deemed most suitable to the circumstances of the colony. That Act, however, was repealed by 4 Vic., No. 23, which was in its turn repealed by 9 Vic., No. 27, which as well as 11 Vic., No. 9, was passed for a limited period. These two last mentioned Acts were continued in force by 14 Vic., No. 25, and

subsequent Acts to the end of 1856, when they were suffered to expire. The only Act, therefore, of New South Wales, relating to masters and servants which was in force when Moreton Bay was erected into a separate colony, was 20 Vic., No. 28, and this was repealed by the Queensland statute 25 Vic., No. 11. None of the Acts which I have enumerated profess, in terms, to impeach 5 Eliz , c. 4, and it could only be repealed by implication if its provisions were inconsistent with those of any colonial Act now in force, the only Act in force being 25 Vic., No. 11. I see nothing, I confess, in that Act, from first to last, which takes away the remedy which is given by the Act of Elizabeth, or ousts the jurisdiction of the magistrate. It ought to be well understood by all classes, that a master may not beat his servant, nor a servant beat his master, and that such conduct in either case affords lawful cause for departure or dismissal from the service.

With regard to the third ground, that the order was informal, the Court has power to amend any informality in the order, though not in the information, and I accordingly direct that the order be so amended that it may appear on the face of the order that Burns was a "servant in husbandry."—(See *R. v. Hulcott*, 6 T. R., 583).

The rule for a prohibition must be discharged, but, as the matter was not free from difficulty, without costs.

BANK OF AUSTRALASIA *v.* BOYLAND.

1862
12th February.

Lutwyche, J.

Special jury—Challenge to array—11 Vic., No. 20, ss. 8, 24, 56—Revision of jury list—Panel selected by an interested party.*

The list for special juries was selected by the sheriff. Magistrates were summoned to attend to revise the list, one of which magistrates was in the employ of the plaintiffs.

Held, that there was no ground to challenge the array.

ACTION by the Bank of Australasia against Boyland to recover monies due under bonds.

Pring, A. G., for the plaintiffs.

Gore Jones and *Lilley* for the defendant.

Upon the case being called *Gore Jones* tendered a challenge to the array, on the ground that the panel had been selected by a person not indifferent to the cause about to be tried, viz., by E. R. Drury, an agent for the plaintiffs.

Pring, A.G., objected that the challenge could not be placed on the record, on the ground that a special jury could not be challenged.

LUTWYCHE, J., overruled the objection.

Pring, A. G., then put in a counter plea that the special jury list was not prepared nor revised by E. R. Drury, but by Messrs. Douglas and Drury, and that the said E. R. Drury did not revise nor interfere with the panel of the special jury list, which was prepared by the sheriff; and that the panel had not been selected by a party not indifferent.

Jones: Defendant rejoins to this plea and submits that a list of names was submitted to the magistrates for their revision by the sheriff. On this list were the names and callings of the different parties returned. From that list, by putting the word "merchant" or "Esquire" after certain names on it, the list of special jurymen was formed, and the sheriff then from this list returned the number required to form a panel. If the sheriff were put in the box and asked to produce the list, it would then be seen that it has been corrected and

* See now 31 Vic., No. 34, s. 8.

initialled by Mr. Drury, and that certain names of some very respectable men, who have always hitherto been on the special jury list, had been struck out. Under these circumstances—Mr. Drury being in the employ of the plaintiffs—defendant contends that the panel has been selected by a party not indifferent, and that the question resolves itself into this, whether parties interested in a suit should be allowed to have the selection of jurymen.

LUTWYCHE, J.: Assuming all that to be true the question still remains, have I the power to set the panel aside? By the Jury Act in force here I have only such power as is possessed by the courts of law at Westminster. Can you cite any case of a panel having been set aside on such grounds as those stated?

Jones: The circumstances and course of proceeding are so different that a precisely similar case could not arise at home. The objection in principle is the same as a man sitting to try his own case.

Pring, A.G.: The plaintiff contends that if the objection were upheld every man who was a magistrate would be precluded from having a case at law. By the present Act (s. 36) two justices are summoned to revise these lists under a penalty of £10 if they do not attend the summons. Mr. Drury has been summoned in this instance. The sheriff selected the panel.

LUTWYCHE, J. The only case which bears any analogy to the present one is *R. v. Edmonds* (4 B. & Ald. 471), in which the objection to the panel, on the ground that the sheriff was interested, was overruled, as it was argued that the sheriff had merely done that in selecting the panel which, by his office, he was compelled to do. In the present case the magistrate summoned was bound to attend the summons and do a certain duty under a penalty. [*Jones:* There is no penalty for absence for reasonable cause.] The challenge must be overruled.

SLACK *v.* BURT.

1862.
13th February.
15th April.

Lutwyche, J.

Partnership—Mortgage of interest by one partner to another—Power to sell—Waste—Dissolution—Injunction—Costs of affidavits containing irrelevant or scandalous matter—Parol evidence inadmissible to vary a deed.

B. and S. entered into partnership as graziers for five years, and, by the deed of partnership, it was stipulated that S. should reside on the station, and that B. should provide for the payment of the purchase money; and that, if either partner did, or omitted to do, anything to the prejudice of the interest or business of the firm, the other partner should be at liberty to give the offending partner notice, in writing, of the dissolution of the partnership. By a mortgage, on the same date, S. assigned his moiety of the station, etc., to B., to secure the repayment of S.'s share of the purchase money, subject to the proviso, that, if default should be made in the payment of any sum thereby secured, or of any interest thereon, B. might, without any notice to S., enter and sell S.'s share of the partnership.

S. entered into possession, but paid no interest. B. subsequently gave S. notice that his authority to deal with the station was determined, and placed M. in possession. No notice, in writing, was given to S., declaring the partnership dissolved. B. advertised the sale of the station and stock. S. obtained an injunction, restraining B. and M. from selling, or otherwise disposing of the station and stock.

On a motion to dissolve the injunction, *held*, that the conduct of B. amounted to waste, and that S. would have been entitled to the injunction if no power to sell had been provided in the mortgage deed; but, as the defendant had power of sale under that deed, the injunction was dissolved with costs.

Cofton v. Horner, 5 Price 537, and *Read v. Bowers*, 4 Bro. C.C. 441, distinguished.

S. alleged an oral agreement, made at the time of the execution of the mortgage, relieving him of the liability to pay interest if the station did not pay expenses, in consideration of his managing without salary.

Held, that the evidence was inadmissible to vary the mortgage deed.

Costs of affidavits containing irrelevant or scandalous matter will be disallowed.

MOTION on behalf of defendants, Sydney Charles Burt and Arthur Hannibal Macarthur, to dissolve an injunction obtained by plaintiff, Slack, restraining them from selling, disposing of, or dealing with certain stations and the stock thereon.

The facts and arguments are fully set out in the judgment of the learned Judge.

Bramston and Lilley for the defendants.

Pring, A. G., for the plaintiff.

C. A. V.

April 15th.

SLACK *v.* BURT. Lutwyche, J.

LUTWYCHE, J. An injunction was granted, on the 13th February last, on an application, *ex parte*, to restrain the defendants, S. C. Burt, and A. H. Macarthur, from driving away or removing from the stations of Gulnarbar and Currie, and from selling or otherwise disposing of, or in anywise dealing with the said stations, or any cattle, horses, and other stock then running and being thereon, or the produce thereof, until further order of the Court. On the 8th instant, a motion was made to dissolve the injunction, with costs, and the material facts of the case are as follows:—

By a deed of partnership, bearing date 26th March, 1860, Slack and Burt became partners in the business of graziers or stock-holders, on the stations of Gulnarbar and Currie, in the district of Maranoa, under the style of Burt and Slack, for the term of five years, from the first of January, 1860, subject to certain conditions. It was stipulated that the plaintiff, Slack, should reside on the said stations and manage them, and that Burt, who lives in Sydney, should provide for the payment of the joint and several promissory notes given by himself and Slack for a portion of the purchase money of the stations, part having been paid, in cash, by Burt. If either of the partners wilfully did, or omitted to do, anything contrary to the provisions of the partnership deed, whereby the business or interest of the firm should be prejudiced, the other partner was to be at liberty to give the offending partner, within twenty-one days after it came to his knowledge, notice in writing, declaring the dissolution of partnership. By a deed of mortgage, bearing even date with the partnership deed, the plaintiff assigned his moiety of the station and stock to the defendant Burt, in order to secure to Burt the payment of £7 500, the plaintiff's share of the partnership money, for which Burt had made himself responsible. The mortgage was subject to a proviso for re-assignment, upon repayment of the principal and other sums due to Burt, on the 1st January, 1863, and upon due payment of interest quarterly, at the rate of 10 per cent. per anuum. Slack never paid any interest; but, in the affidavit which was filed in support of the motion for an injunction, he stated that it was agreed, at the time of the execution of the mortgage, that, in consequence of his managing the station without salary, in the event of the proceeds of the station not being sufficient to enable the plaintiff to pay the interest, such payment should not be insisted on. The plaintiff

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entered upon the management of the station, and continued to manage it until December, 1861, when he came to Brisbane for the purpose of meeting his partner, Burt; but on learning through the telegraph that Burt had gone to Tasmania he went back to the station. Before his arrival there he received a notice, in writing, from the defendant Macarthur, that he had taken possession of the station and effects on behalf of Burt; and also two notices, in writing, from Burt, styling himself mortgagee in possession, and stating that Slack had no authority to draw orders on him (Burt), or to deal further in any matter relating to the station. No notice, in writing, declaring a dissolution of the partnership, was sent by Burt to the plaintiff. Soon after Macarthur had taken possession of the station, the defendant Burt advertised the stock and station for sale in the *Sydney Morning Herald* and the *Queensland Courier*.

In moving for a dissolution of the injunction, Mr. Bramston and Mr. Lilley, who appeared as counsel for the defendants, relied on four grounds. They contended—1. That Burt was Slack's partner, and had not committed any waste of the partnership assets. 2. That, in his capacity as mortgagee, Burt had exercised a legal right, under a power of sale, with which legal right a court of equity would not interfere. 3. That in the affidavit upon which the motion for an injunction was founded, an important fact, namely, the non-payment of interest, had been withheld from the Court. 4. That the injunction was too large, inasmuch as it restrained the defendants from selling, not only the whole of the partnership property, but any portion of it.

The view, however, which I take of the two first grounds for dissolving the injunction, makes it unnecessary to express any opinion upon the third and fourth. It was urged, in support of the first ground, that one partner cannot commit waste of the partnership assets unless he commits intentional serious injury, and that mere mismanagement, or error in judgment, would not justify the interposition, by an injunction, of a court of equity. Much stress was laid upon *Cofton v. Horner* (5 Price, 537, cited in Collyer on Partnership, 2nd edition, p. 239). In that case the plaintiff and defendant agreed to dissolve partnership, and that the defendant, on payment of half the value of the effects, should take the whole. The defendant accordingly took possession of the partnership property, but failed to make payment, and had begun to pull down part of the building. The plaintiff filed his bill for an account, and for an injunction from collecting the debts, etc., and from committing wa[illegible]te

on the partnership premises. He then moved for an injunction, before answer, on the usual affidavit, but the Court of Exchequer held that the conduct of the defendant did not amount to waste, and dismissed the application. The present case, however, is distinguishable from *Cofton v. Horner*, in two important particulars. In the first place, there was no agreement between partners that the partnership should be dissolved. The defendant, Burt, has not even availed himself of the right reserved to him by the partnership deed of giving Slack a notice in writing, declaring a dissolution of the partnership. In the second place, Burt did not deal with a part only of the property, but claimed a right to sell the whole, and had proceeded to enforce such right by advertising the whole for sale. In *Read v. Bowers* (4 Bro., C. C. 441. See note in Collyer on Partnership, 2nd edition, 239), the bill charged the insolvency of the defendant and the *probable* loss of the partnership effects through his acts, and prayed that an injunction might be awarded against the defendant, to restrain him from collecting or receiving any more of the debts due to the partnership, which, on hearing the plaintiff's affidavit and the Six Clerks' certificate read, was ordered accordingly, until defendant should fully answer the plaintiff's bill and the Court make other order to the contrary. The present case appears to be a stronger case than *Read v. Bowers*. The whole of the property was advertised for sale, and, once sold, Slack would have had no security that any portion of the purchase money would find its way into his hands. Looking at the conduct of Mr. Burt in a partnership light, I am bound to say it amounted to waste. His acts were not "within the usual legitimate exercise of the right of enjoyment of the estate" which would have permitted him to deal with the corpus of the property for the benefit of both partners during the period assigned for the continuance of the partnership, but were "destructive of the whole estate." (Story's Eq. Jur., Vol II., s. 916.) I will only add, on this part of the case, that if the motion for a dissolution of the injunction had rested upon action of Mr. Burt in his character as a partner, I should have felt it my duty to have dismissed the motion with costs.

Mr. Burt comes before the Court in another capacity, as mortgagee with a power of sale, which is referred to and set out in the third paragraph of the plaintiff's bill, as follows:—

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"And by the same indenture of mortgage, it was provided that if default should be made in payment of the said principal sum of £7,500, or of any other sum and sums of money intended to be thereby secured as aforesaid; or of any part of the same respectively, or of the interest thereon, at the rate, at the time, and in the manner aforesaid; or in the event of non-observance or non-performance by the said mortgagor of any of the covenants, clauses, and conditions, provisions, and agreements contained in these presents, or in the thereinbefore in part recited indenture of co-partnership, then, and immediately thereupon, or at any time thereafter, it should be lawful for the said mortgagee, his executors, administrators, and assigns, without any further or other authority than was therein contained, and without any notice whatsoever to the said mortgagor, to take possession of the said moiety, half, part, or share, or other, the estate or interest of the said mortgagor of, in, and to the said station, run, live stock, cattle, increase, progeny, and produce, goods, chattels, effects, and premises; and at any time after such default as aforesaid, without any further or other authority than was herein contained, and without any notice whatsoever to the said mortgagor, to sell and absolutely dispose of the same, or any part thereof."

The Attorney-General, on behalf of the plaintiff, contended that these words only implied that, if default took place in payment of the principal, the whole of the property might be sold, and a portion of it, if default were made in payment of the interest, *reddendo singula singulis*. But I think I should do unprecedented violence to language if I adopted that construction. It is impossible to read the stringent words of the power of sale without seeing that it applies to any default, however slight, and enables the mortgagee to enter and sell the whole or any part of the property at his discretion. I am bound, therefore, by the authority of *Matthie v. Edwards*, (16 L. J (Ch.) 405), in which the decision of Knight Bruce V. C. (2 Coll. 465) was overruled by Lord Chancellor Cottenham, and must hold with him that the Supreme Court has no equitable jurisdiction over Mr. Burt's legal right, "merely because it is shewn it might have been executed with a little more lenity."

The Attorney-General, however, further contended that it was not competent for the mortgagee to take advantage of any default in the payment of interest, because, at the time of the execution of the mortgage deed, it was orally agreed between the parties that, as the plaintiff was to manage the station without salary, in the event of the proceeds of the station not being sufficient to enable the plaintiff to pay the interest as it became due, such payment should not be insisted upon. The fact of such an agreement having been made at the time of the execution of the mortgage, is positively denied by Burt and two other witnesses who were present when the deed was executed; and, in a supplementary affidavit, the plaintiff somewhat shifts his ground, and

says the conversation took place in Burt's inner office, when nobody but their two selves was present. But, if the agreement were uncontradicted, it amounts to nothing more than a parol agreement, which cannot be received to vary a written instrument The Attorney-General cited a note of a case in 5 Brown's Parliamentary Cases (*Milton v. Edgeworth*, 5 Bro. P. C. 313), from which it appeared that an oral agreement for the reduction of interest secured by a mortgage deed is good. That case is not, at present, accessible in the colony; and it is impossible to judge of the effect of a decision unless we are made aware of the facts on which the decision was given. But it is remarkable that Mr. Taylor, in his work on Evidence, takes no notice of *Milton v. Edgeworth*, and it can hardly be supposed that it would have been omitted if it had any real bearing on the point now under consideration. But, assuming *Milton v. Edgeworth* to be a decisive and binding authority to the extent alleged by the Attorney-General, it applies only to a reduction in the rate of interest, and this Court could not hold that the principle of that case was applicable to a contemporaneous oral agreement, that the payment of interest should depend on a *contingency*, without opposing itself to a host of cases which will be found collected in Taylor on Evidence, Vol. II, p. 758.

Upon the whole, therefore, I feel constrained to dissolve the injunction with costs. The Master will be directed, in taxing the costs, to look into the affidavits, and distinguish what part or parts thereof is or are of unnecessary length, and ascertain the costs occasioned to the plaintiff by the part or parts so distinguished, and make such allowance or set-off in his favour against the costs taxed for the defendant as the Master may deem just. Much impertinent matter has been introduced into the affidavits on both sides, and, on the part of the plaintiff, matter has been inserted which might have been excepted to as scandalous if it had appeared in a pleading. It is desirable that suitors should be reminded, in an effective manner, that when they come before the Court they must confine themselves to the matter in hand, and neither, to use Lord Chief Baron Gilbert's phrase, "tell the Court the tale of the tub," nor insert unnecessary allegations, bearing cruelly upon the moral character of an individual. Such proceedings this Court will invarably strive to discountenance and repress.

In the Matter of THE REAL PROPERTY ACT OF 1861.

SPECIAL CASE (No. 1.)

1 and 2 Vic., c. 110, s. 13; 19, 25 Vic., No. 13, s. 38, 54 Geo. III., c. 15—Real Property Act of 1861 (25 Vic., No. 14), ss. 16, 19, 20—Application to bring land under the Act—Registration of judgments.

1862.
24th, 27th January.

Lutwyche, J.

Before the passing of the *Real Property Act of 1861*, a judgment entered up but not followed by a writ of execution operated and still operates upon the land of the debtor, and, consequently, it forms a charge which ought to be registered if brought to the knowledge of the Registrar-General.

A judgment entered up in the Supreme Court against any person binds all his real estate so long as the judgment is outstanding.

The Registrar is required to reject applications to bring land under the provisions of the Act of 1861 whenever a judgment against the applicant is outstanding, and the judgment creditor does not join in the application.

Where a judgment has been satisfied, or proceedings have been stayed, the Registrar may treat the land or the judgment debtor as discharged from the judgment.

SPECIAL CASE for the opinion of the Court stated pursuant to s. 14 of the *Real Property Act of 1861.*

By 54 Geo. III., c. 15, the houses, lands, and other hereditaments and real estates situate within the colony of New South Wales, belonging to any person indebted, shall be liable to, and chargeable with, *all* his just debts, and shall be assets for the satisfaction of them in like manner as real estates are liable to the satisfaction of debts due by bond or *other speciality*, and may be sold and disposed of in like manner as personal estates in the said colony are sold or disposed of for the satisfaction of debts.

By 1 and 2 Vic., c. 110, s. 13, it is enacted that a judgment entered up *against any person* in any of Her Majesty's Superior Courts at Westminster, shall operate as a charge upon all lands, tenements, and hereditaments of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled, for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy; and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment; and that every judgment creditor shall have such and the

same remedies in a court of equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon; and it is by the same section provided that nothing therein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration.

By s. 19 of the same Act it is enacted that no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, (all which by a previous section are, if any sum of money becomes payable, thereby to have the effect of a judgment), shall, by virtue of the Act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, until they have been registered in the manner provided by the Act.

It appeared that the Act last mentioned had never been adopted in New South Wales or in this colony, but, by an Act of the Queensland Legislature, *The Supreme Court Constitution Amendment Act of 1861* (25 Vic, No. 13, s. 38), the Sheriff of the colony is empowered to seize and take under any writ of execution whereby he is directed to levy any sum of money, and to cause to be sold, all the lands, tenements, and other property of or to which the person named in the said writ against whom any judgment, decree, or order has been recovered or pronounced, may be seized, possessed, or entitled, or which he can, either at law or in equity, assign or dispose of, whether such person be resident within or without the colony.

By s. 16 of the *Real Property Act of 1861* it is enacted that the Registrar-General shall not receive any application from the proprietor of any land in respect *to which* any judgment may have been entered up, unless the judgment creditor shall consent to such application. By the application therein referred to is meant "an application to bring under the provisions of the said Act land held by the owner for an estate of freehold."

Applications having been made to the Registrar-General by persons wishing to bring their land under the provisions of the *Real Property Act*; but the Registrar-General being in doubt whether, before receiving such applications, it was necessary that he should be satisfied

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as to the existence of any judgments entered up against the applicants, the opinion of the Court was sought upon the following questions of law:—

1. Whether, upon the state of the law before the passing of the *Real Property Act*, a judgment which had not been followed by a writ of execution, formed such a charge (if any) upon the land of the debtor that it must now be registered if brought to the knowledge of the Registrar-General.

2. Whether, under the clause of the *Real Property Act* set out, a judgment not followed by a writ of execution becomes such a charge.

3. Whether, upon that clause, the Registrar-General is required to reject applications, if the applicant should appear to have had a judgment at any time entered up against him, and that the judgment creditor has not joined in the application.

4. Whether, if a judgment be a charge, and a judgment has been entered up and has been satisfied, or proceedings have been stayed, the Registrar-General may treat the land as discharged from the judgment, and may receive the application.

Bramston, Master of Titles, sought the opinion of the Court as above.

C. A. V.

27th February.

LUTWYCHE, J. I am of opinion that, before the passing of the *Real Property Act*, a judgment entered up, but not followed up by a writ of execution, operated, and still operates, upon the land of the debtor, and, consequently, that it ought to be registered if brought to the knowledge of the Registrar-General.

54 Geo. III, c. 15, extends to creditors on simple contracts the same remedies, with respect to the real estate of their debtors, as were previously open to specialty creditors. It further provides that both classes of creditors may sell the whole of the land instead of extending half of it under an *elegit*, as was the law of England at that period. Such I conceive to be the legal effect of that portion of the clause which provides that the real estates of persons indebted may be sold and disposed of, in like manner as personal estates are sold or disposed of in the colony, for the satisfaction of debts.

A judgment entered up against any person in the courts of law at Westminster had the effect of binding all lands, tenements, and hereditaments, of which the defendant himself, or any persons in trust for him, was seised or possessed of at the time when the judgment was recorded, as well as any real estate subsequently acquired by him; and a judgment entered up in the Supreme Court of this colony against any person binds all his real estate so long as the judgment is outstanding.

The answer which I have given to the first question submitted for the opinion of the Court in the special case makes it unnecessary to answer the second. As to the third question, I think that the Registrar-General is required to reject applications to bring land under the provisions of the Act, whenever a judgment against the applicant is outstanding, and the judgment creditor does not join in the application.

From the language of the 16th, as well as of the 19th and 20th sections of the *Real Property Act of 1861*, the intention of the Legislature may be plainly gathered, that no land alienated from the Crown in fee before the 1st January, 1862, should be brought under the provisions of the Act, unless with the consent of all the persons beneficially interested. A judgment unquestionably conveys to the judgment creditor a "beneficial interest affecting the title" to land; and, although it may not, perhaps, be technically accurate to say, as the 16th section does, that a judgment may have been entered up in respect to *land*, the meaning of the clause is clear enough.

I think that where a judgment has been satisfied, or proceedings have been stayed, the Registrar-General may treat the land as discharged from the judgment, the judgment creditor having no longer any beneficial interest affecting the title to such land.

In the Matter of THE REAL PROPERTY ACT OF 1861.

SPECIAL CASE (No. 2.)

1862.
10th April.

Lutwyche, J.

7 Vic., No. 16, s. 21—25 Vic., No. 14, ss. 1, 16, 19, 20—Application to bring land under the Act—Judgment not followed by execution.

A judgment not followed by a writ of execution binds land alienated by the Crown before 1862 in such a manner that the Registrar-General will be compelled to reject any application to bring such land under the operation of the Act, if a judgment has been at any time entered up against the applicant, and the judgment creditor has not consented to the application.

SPECIAL CASE stated for the opinion of the Court under s. 14, of the *Real Property Act of 1861.*

By s. 16 of the *Real Property Act of 1861*, the Registrar-General shall not receive any application from the proprietor of any land in respect to which any judgment may have been entered up, unless the judgment creditor shall consent to such application. By the application herein referred to is meant "an application to bring under the provisions of the said Act land held by the owner for an estate of freehold."

By s. 21 of 7 Vic., No. 16 (now repealed, see 31 Vic., No. 17, s. 45) intituled "An Act to consolidate and amend the laws relating to the registration of deeds and other instruments in that part of the colony of New South Wales not comprehending the district of Port Phillip," it is enacted and declared that no judgment in any action at law, recovered or to be recovered, shall bind or affect, or be deemed to have bound or affected, any lands or hereditaments in the said colony. Provided always that every writ of execution, or any such judgment against the lands or hereditaments of the person against whom such judgment shall be obtained, when delivered to the sheriff of the said colony, or to the sheriff of any district thereof, as the case may be, shall affect and be deemed to have bound such lands, from the time of such delivery thereof, in like manner as any writ of *fieri facias* now binds goods and chattels.

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Application having been made to the Registrar-General by persons wishing to bring their land under the provisions of the *Real Property Act*, but the Registrar-General being in doubt whether, before receiving such application, it was necessary that he should cause search to be made for any judgments that might have been entered up against the applicants, the opinion of the Court was sought by the Registrar-General upon the following question of law:—

Whether, under the clauses of the *Real Property Act of 1861*, and of the *Deeds Registration Act* above set out, a judgment not followed by a writ of execution so binds land that the Registrar-General must reject an application, if such a judgment has been at any time entered up against the applicant, and the judgment creditor has not consented to the application?

LUTWYCHE, J. After giving full consideration to this special case, I have come to the conclusion that a judgment not followed by a writ of execution binds land, alienated by the Crown before the 1st January, 1862, in such a manner that the Registrar-General will be compelled to reject any application to bring such land under the operation of the *Real Property Act of 1861*, if such judgment has been at any time entered up against the applicant, and the judgment creditor has not consented to the application.

The first clause of the *Real Property Act of 1861* repeals all laws, statutes, etc., relating to freehold and other interests in land, so far as they may be inconsistent with the provisions of the Act, and so far as regards their application to land under its provisions, or the bringing of land under the provisions of the Act. In other words, when land is to be brought under its operation, we are to look to the Act, and the Act only, as our guide.

The proviso in the 16th section prohibits the Registrar-General from receiving any application from the proprietor of land against whom any judgment may be outstanding, unless the judgment creditor joins in the application (see *Special Case* No. *1). The words of the Act are sufficiently plain to shew that the Legislature intended to require the consent of all persons beneficially interested. S. 21 of 7 Vic., No. 16, did not divest the judgment creditor of his chattel interest in the land of his debtor, but made that interest contingent instead of absolute. He had no security for the payment of his debt until he had lodged the writ of execution in the hands of the sheriff;

* Ante p. 56.

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but, by signing judgment against his debtor, he acquired an *inchoate* right to such a security, and the formal delivery to the sheriff was all that was necessary to complete his title. Is such a contingent interest, then, a beneficial interest? I am of opinion that it is. It has been held that a beneficial occupation for the purpose of rating may be an occupation which entails a loss on the occupier (*R. v. Parrot*, 5 T. R. 593). The test is not the actual profit made, but the capability of yielding a profit (see Sir W. W. Follet's *arguendo* in the *Governors of Bristol Poor v. Wait*, 5 Ad. & El. 6); and by a parity of reasoning, a contingent interest which may be converted at any moment, by the party's own act, into an absolute interest, when he will be enabled to reap the fruits of his judgment, appears to me to be an interest which is beneficial. I do not think, therefore, that the terms of the 21st section of 7 Vic., No. 16, are inconsistent with the provisions of the 16th, 19th, and 20th sections of the *Real Property Act of 1861*, but, even if they were, I should hold that they were overridden and repealed by the operation of the first section of the latter Act. The practical result of this opinion will be, that in all cases in which land has been alienated by the Crown before the 1st January, 1862, and is sought to be brought under the operation of the Act, a search will have to be made for judgments against the proprietor, and the consent of the judgment creditors (if any) must be obtained before the title can be completed and registered. This may lead to inconvenience and expense, but not to greater expense or inconvenience than is sustained in England under the existing law of that country, and, on the other hand, it would seem to be manifestly unjust to give an indefeasible title to land when the debtor comes in behind the backs of his judgment creditors, and, without their knowledge or concurrence, attempts to deprive them of what they have been accustomed to regard as a tangible security.

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Seditious libel—Information by Attorney-General, ex officio, by resolution of the Legislative Council—Charge to jury in trial for seditious libel—Law and custom of Parliament—32 Geo. III., c. 60, s. 1.

1862.
23rd August.
Lutwyche, J.

The Attorney-General, *ex officio*, by direction of the Legislative Council of Queensland, filed an information against the printer and publisher of a newspaper, for an alleged seditious libel on that body.

LUTWYCHE, J., charged the jury that a seditious libel could not be published of and concerning the Legislative Council.

Information presented by the Attorney-General, *ex officio*, at the request of the Legislative Council, against Theophilus Parsons Pugh, for having printed and published in the *Courier*, on 30th July, 1861, a seditious libel of and concerning the Legislative Council of Queensland.

Pring, A. G., and Bramston prosecuted.

Gore Jones and Carey for the defendant.

A plea that the Court had no jurisdiction, as being illegally constituted, was overruled. The learned Judge stated that he held his commission under the Imperial Statute, 18 and 19 Vic., c. 54, and referred to the order of Council of 5th June, 1861.

A plea of not guilty was then entered.

LUTWYCHE, J., at the conclusion of the trial, delivered the following charge to the jury:—

Gentlemen of the jury.—The defendant in this case, Theophilus Parsons Pugh, is charged by the Attorney-General, acting *ex officio*, with the publication of a false, scandalous, malicious, and seditious libel in the *Courier* of 30th July last, of and concerning the Legislative Council of this colony. The defendant has pleaded "not guilty" to the information which has been filed, and you are to say by your verdict whether you think the defendant has published a seditious libel or not. There are reasons, gentlemen, for desiring that this case should have been tried before any other Judge than myself. The article in the *Courier*, which is alleged to reflect in a seditious manner on the

R. v. PUGH. Legislative Council, contains a warm defence of the conduct of Mr.
Lutwyche, J. Justice Lutwyche, as well as a warm attack upon the conduct of the Legislative Council, in reference to the present Judge of the Supreme Court. I am placed, therefore, in a very invidious position, and the duty which I have to perform this day is far from being agreeable to me. But, gentlemen, whether the performance of a duty be agreeable or not, a duty must be discharged, and I shall endeavour to fulfil mine in such a manner as to leave as little occasion as possible for unfavourable comment. I shall deal with this case precisely in the same way, and direct you on points of law in the same terms, as if the Judge whose conduct has been censured by the Legislative Council were my colleague on the Bench, or, say, for instance, the gentleman who is senior in point of standing at the Bar, Mr. Blakeney. I shall pursue in this case the same course which I have invariably followed ever since I have had the honour of a seat on the Bench of the Supreme Court, in civil actions for libel and slander. I shall not express any opinion of my own upon the alleged calumnious character of the publication, nor shall I say what I think of the conduct of the defendant in relation to the circumstances which have been disclosed by the evidence. But I shall be bound to tell you whether this publication, assuming it to contain a false, scandalous, and malicious libel upon the Legislative Council, amounts to a seditious libel, for that, as the case now stands, is purely a question of law; and, as there is no appeal from my decision in criminal matters, I thought it right, in order that I may neither be misunderstood nor misquoted, to reduce my charge into writing.

As you will perceive, I have anticipated all the points which have been raised at the bar, and have considered some points which have not been urged by counsel, but which, nevertheless, appear to me necessary to be discussed, in order to arrive at a proper understanding of the great constitutional question involved in this trial.

(The learned Judge here read over the information and the notes which he had taken of the evidence, and then proceeded as follows):—

I am constrained, in the outset, to express my disapprobation of the manner in which this information has been drawn. In the copy which lies before me, there is much matter which does not reflect on the Legislative Council in any way. I suppose, to save trouble, it was deemed expedient to insert the article in the *Courier* entire, but such a course is hardly fair towards a defendant, as it must tend to distract his attention from the charge which he has to meet, and it swells the

costs of the defence, which, whether he be convicted or acquitted, the defendant will have to pay. I hope I shall not have occasion, in any future prosecution for a libel, to repeat these remarks.

Gentlemen, the offence known to the law as libel consists in the malicious publication of defamatory matter, expressed either in writing or in printing, or by signs or pictures, and which publication tends either to corrupt the mind of the public, and to destroy the love of decency, morality, and good order; or, in the case of an individual, to expose him to hatred, ridicule, or contempt. A private individual may bring an action to recover damages for the injury done to his character by such a publication; but the ground of the criminal proceeding is the public mischief which libels are calculated to create in alienating the minds of the people from religion and good morals, and rendering them hostile to the Government and magistracy of the country, and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. (1 Russell on Crimes, p. 211, Ed. 1826.) It appears to have been considered at one time that the remedies by action and indictment for libels were co-extensive, and might be regarded as upon the same footing, but this could formerly only have been understood of cases where the libel, from its nature and subject, inflicted a private injury, and not of those cases in which the public only could be said to be affected by the libel. Now, however, by the Act 11 Vict., No. 13, s. 10, it is provided that on the trial of any indictment or information for a defamatory libel, the truth of the matters charged may be inquired into, if it be alleged by the defendant that it was for the public benefit that the matters so charged should be published, and if he set forth the particular fact or facts by reason whereof it was for the public benefit that the matters so charged should be published. But this section does not apply to seditious libels (*R. v. Duffy*, 2 Cox C.C. 45, Rose on Evidence, p. 655, Ed., 1857); and, consequently, in pleading to the present information, the defendant was restricted to the plea of "not guilty," under which plea evidence is receivable to show either that he never published the alleged libel, or that the matter contained in it is not seditious, and was justified by the occasion on which it was published. The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it, and the publisher must be presumed to intend what the publication is likely to produce, so that if it is likely

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to excite sedition, he must be presumed to have intended it to have that effect. (*Rex* v. *Burdett*, 4 B. & A. 95).

Gentlemen, there can be no doubt that an information may be supported for the publication of a false, scandalous, and malicious libel on the Legislative Council or the Legislative Assembly of this colony. The two Houses of Legislature have very important functions to discharge, and are on that account entitled to consideration and respect. Not only do they assist in the making of the laws by which we are governed, but they form the grand inquest of the colony; and, by a recent colonial enactment (25 Vic., No. 7), extensive powers, which did not belong to them at common law, have been conferred on them in order that their deliberations may be carried on in perfect tranquillity and with greater efficacy than before. The utmost freedom of debate is allowed, and any member of either house may say within its walls whatever he pleases of any person not being a member, without being responsible, either civilly or criminally, for the consequences. No doubt this privilege may be abused, but no human institution is perfect. Unfortunately, experience teaches us that men whom neither nature nor education have fitted for the position, occasionally find their way into Colonial Legislatures, and even into the Imperial Parliament. Men of this stamp, sometimes from mere thoughtlessness, sometimes from the working of an ill regulated mind, indulge themselves by scurrilous attacks upon public and private character, and knowing they have, to quote the language of Mr. Justice Coleridge (*Stockdale v. Hansard*, 9 Ad. and Ell. 242) a legal monopoly in slander, are apt to make the most of the commodity. For all this there is no redress, save in the expression of public opinion, and public opinion generally finds a channel for expression in the public press. The privileged slanderer is not protected from public criticism, provided the criticism be fair and honest. And this rule applies not merely to an individual member of either house, but to each house and both houses collectively.

I have said that the Legislature is a grand inquest of the colony. If, however, it should proceed without inquiry—if, while acting in a *quasi* judicial manner, it should accept surmises and insinuations as proofs, and deal with suspicions as conclusive evidence—a public writer would be justified in commenting upon such conduct with freedom, and even with severity. "I think it quite right," says Lord Chief Baron Pollock, in *Gathercole* v. *Miall* (15 M. & W. 332) "that all matters that are entirely of a public nature, conduct of Ministers, conduct of Judges, the proceedings of all persons who are responsible to the public at large,

are deemed to be public property, and that all *bonâ fide* and honest remarks upon such persons and their conduct may be made with perfect freedom and without being questioned too nicely for either truth or justice." In the same case, Mr. Baron Alderson observes (p. 338), "It seems there is a distinction, although I must say I really can hardly tell what the limits of it are, between the comments on a man's public conduct and upon his private conduct. I can understand that you have a right to comment on the public acts of a Minister, upon the public acts of a general, upon the public judgment of a judge, upon the public skill of an actor—I can understand that; but I do not know where the limit can be drawn distinctly between where the comment is to cease, as being applied solely to a man's conduct, and where it is to begin, as applicable to his private character; because, although it is quite competent for a person to speak of a judgment of a judge as being an extremely erroneous and foolish one (and, no doubt, comments of that sort have a great tendency to make persons careful of what they say); although it is perfectly competent for persons to say of an actor that he is a remarkably bad actor, and ought not be permitted to perform such and such parts so ill; yet you ought not to be allowed to say of an actor that he has disgraced himself in private life, nor to say of a judge or Minister that he has committed felony, or anything of that description which is no way connected with his public conduct or public judgment." And, therefore, gentlemen, if any public writer, or speaker at a public meeting, should comment, as he has a perfect right to do, on the proceedings of either house of the legislature, or on the conduct of members of either house, he must confine his remarks to their behaviour as public bodies and public men. He would not be justified, for instance, in saying of one member that he was a murderer (see *Harwood v. Sir J. Astley*, 1 B. & P. N.R. 47), or of another, that he was an adulterer, a gambler, and a drunkard; or of a third, that he was a griping landlord and a tyrannical master to his servants. By making remarks like these he would overstep the boundaries of legitimate criticism, although he might think he had good reason for believing that what he was saying was true. But the law will protect any man in making comment, however strongly worded, on the public conduct of public bodies and public men, if those comments be made in good faith and in honest spirit.

Gentlemen, I have made those observations because it seems to me that they are much needed at the present juncture. I expected

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that the Attorney-General would have filed an information against the defendant for a scandalous libel reflecting on the Legislative Council, and, as I have already intimated, there is no doubt that the publication of such a libel, if proved to the satisfaction of a jury, would subject the offender to severe penalties. It is quite true that in the mother country prosecutions of this kind have fallen into disuse. The last case which I have been able to find is in *R. v. Reeves* (Peake's Addl. Cases, 84, Ed., 1796), about 65 years ago, in which the prosecution was instituted by the Attorney-General, in consequence of a resolution of the House of Commons, declaring a pamphlet published by the defendant to be a libel. The Imperial Parliament has now no need of prosecution for libels to support its character and dignity, although they were occasionally instituted in more arbitrary times. Still, the right of prosecution exists, and if the Legislative Council of this colony deems it expedient to resort to such proceedings, it will be the duty of this Court to give them full effect. They must, however, be commenced in some other way than by an information *ex officio*. The usual objects of an information *ex officio*, are properly such enormous misdemeanours as peculiarly tend to disturb or endanger the Queen's Government, or to molest or affront her in the regular discharge of her royal functions, such as a seditious or blasphemous libels or words, seditious riots not amounting to high treason, libels upon the Queen's ministers, the judges or other high officers, reflecting upon their conduct in the execution of their official duties, obstructing such officers in the execution of their official duties, and the like (Arch. Pl. and Evid. 95, Ed. 1856). The Attorney-General appears to have been alive to this difficulty, and, therefore, while complying with the request of the Legislative Council to prosecute the publisher of the *Courier* for a libel, he has filed an information, not for the publication of a scandalous but of a seditious libel. By so doing, however, he has fallen into a graver error than he would have committed if he had filed an information *ex officio* against the defendant for the publication of a scandalous libel on the Legislative Council. In the latter case I should have been prepared to reserve (under the Act 13 Vic., No. 8, s. 1) the point about the form of the information, and the case could then have gone to the jury on its merits. And, gentlemen, if this course had been taken, I might very fitly have adopted, as a portion of my charge to you, a passage from the speech delivered by Mr. Erskine (afterwards Lord Chancellor) in the case of *The King v. Stockdale* (22 Howell's State Trials, 238),

to which the Attorney-General has to-day called the attention of the Court. The defendant in that case was prosecuted for a libel upon the House of Commons by publishing a review of the charges made by the House of Commons against Warren Hastings, formerly Governor of India, and whereby he was impeached of high crimes and misdemeanours. The review was in fact a defence of the conduct of Warren Hastings, and, in answering the charge of libel against Stockdale, his counsel, Mr. Erskine, used these memorable words:—"If, after the performance of this duty (*i e.* the reading of the review), you can return here, and with clear consciences pronounce upon your oaths that the impression made upon you by these pages is that the author wrote them with the wicked, seditious, and corrupt intentions charged by the information, you have then my full permission to find the defendant guilty. But if, on the other hand, the general tenor of the composition shall impress you with respect for the author, and point him out to you as a man, mistaken, perhaps, himself, but not seeking to deceive others; if every line of the work shall present to you an intelligent mind glowing with a Christian compassion towards a fellow man whom he believed to be innocent, and with a patriot's zeal for the liberty of his country, which he considered wounded through the sides of an oppressed fellow citizen; if this shall be the impression on your consciences and understanding when you are called upon to deliver your verdict, then hear from me that you not only work private injustice, but break up the press of England, and surrender her rights and liberties for ever, if you convict the defendant."

These words, gentlemen, with a few verbal alterations which will easily suggest themselves to your mind, would have appropriately formed a portion of my charge to you if the defendant in this case had been indicted for the publication of a false, scandalous, and malicious libel. But the information charges the publication of a seditious libel, and I am bound to tell you that, in point of law, no seditious libel can be published of and concerning the Legislative Council of this colony. What, gentlemen, is sedition? It is defined to be a factious commotion of the people, or a tumultuous assembly of men rising in opposition to law or the administration of justice, and in disturbance of public peace (Webster's Dict.). The precedents for seditious libels and words always charge an intent to stir up and excite discontents and seditions among Her Majesty's subjects, or to excite them to insurrections, riots, and breaches of the peace; and if this be the language of the precedents, it shows what the law is, for pleading is

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the language of the law. Such an intent must be alleged and proved before any man can be convicted of the publication of a seditious libel Does the present information charge any such intent? It does not. It charges, indeed, an intent to bring the Legislative Council into hatred and contempt with "the subjects of the colony"—a clumsy and inaccurate expression—but such an intent, even if carried into execution, would not amount to sedition at common law. It is said by a learned writer on the law of libel (Starkey on Libel, 535), that the same policy which prohibits seditious comments on the King's conduct and government, extends, on the same grounds, to similar reflections on the proceedings of the two Houses of Parliament. With great respect for the authority of that distinguished lawyer, I yet entertain strong doubts whether even the two Houses of the Imperial Parliament had power, at common law, to direct a prosecution for a seditious libel on either of them. The only two cases cited by the Attorney-General to show that the House of Commons had an inherent power to direct a prosecution for seditious libels were *R. v. Almon* (20 Howell's State Trials, 803), and *R. v. Stockdale* already referred to. In the former case the defendant's offence was the publication of "Junius's Letter to the King," and the information contained two counts, the first charging a seditious publication against the King, his ministers, and the House of Commons, and the second charging a seditious publication against the House of Commons. The defendant was convicted, and, as it was at that time considered by all lawyers that an indictment might be sustained if one offence known to the law were duly set forth in it, I can easily understand why the counsel for the defendant did not take any steps to arrest the judgment on the ground that the second count of the information was bad. It is now settled, however, by a comparatively recent decision of the House of Lords (*O'Connell v. The Queen*, 11 Cl. & F., 155), that if there be one bad count in an indictment, and a general verdict of guilty be taken on all the counts, the judgment must be arrested. In *Stockdale's* case the defendant was acquitted, and no opportunity, therefore, was afforded for testing the validity of the information.

These two cases are the only precedents to show what the practice of the House of Commons has been; but, as Lord Denman observes in *Stockdale v. Hansard* (9 Ad. and E. 155)—"The practice of a ruling power in the state is but a feeble proof of its legality." And the doubts which I have expressed are greatly fortified by the subsequent passing of a statute (60 Geo. III, and 1 Geo. IV., c. 8)

containing provisions which would have been unnecessary if the House of Commons had, at common law, the power which was claimed for them. That Act, which was passed in times of great political commotion—about the period of what are termed the Manchester Massacres and the Cato Street Conspiracy—enacted that a libel tending to bring into hatred or contempt either House of Parliament was a seditious libel. The enactment, however, has remained a dead letter on the statute book; but it is quite clear that its operation was intended to be confined to the two Houses of the Imperial Parliament, and had no reference to any existing colonial legislature, to say nothing of a legislature which was not created till forty years afterwards. And, whether the Imperial Parliament possessed at common law the power of prosecuting for a seditious libel or not, it is now well settled that the law and custom of Parliament, under which such a power might have been claimed and exercised, applies exclusively to the House of Lords and House of Commons in England. (*Fenton v. Hampton*, 11 Moo. P.C. Cas. 347.) The law and custom of Parliament is founded on precedents and immemorial usage, under cover of which a ruling power in the state "has committed many acts which posterity has unequivocally condemned." By the creation of a local legislature, such powers only are conferred upon it as are reasonably necessary for the proper exercise of its functions and duties (*Kielley v. Carson*, 4 Moo. P.C. Cas. 63). We owe allegiance to the Queen and obedience to the lawful commands of the Queen's Government; but the Legislature of Queensland forms no part of the Government. Theoretically, as well as practically, the Legislature and the Executive are separate bodies with distinct functions, and any attempt to amalgamate them would only result in confusion and disorder.

The objection to the sufficiency of the information appears on the record, and the defendant may take advantage of it either by a motion in arrest of judgment, or by a special case under the Act 13 Vic., No. 8. As he has pleaded to the information, it will now be for you, gentlemen, to say whether the defendant has published a seditious libel, or whether you think that the article which was published in the *Courier* on 30th of July was justified by the occasion of its publication. I have already said that in point of law a seditious libel cannot be published of and concerning the Legislative Council, though a scandalous libel may; and you are to say whether you will adopt my opinion of a seditious libel or not; and, unless you are satisfied that I am wrong, you will take the law

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from me. In giving you, gentlemen, this direction, I follow the precise terms of a direction given by a very learned judge in a similar case (*Rex v. Burdett*, 4 B. & A., 95), and which direction was considered by the Court of King's Bench to be a correct mode of leaving the question to the jury under 32 Geo. III, c. 60 (Mr. Fox's Libel Act). You will now, gentlemen, be pleased to consider your verdict.

Verdict:—"Not guilty."

Solicitors for defendant: *Lilley & Garrick.*

BANK OF AUSTRALASIA *v.* G. & J. HARRIS.

PRIVY COUNCIL.

1862.

28th February.

Insolvency—5 Vic., No. 17, s. 8—Fraudulent preference—Bill of exchange.

L. & Co. drew a bill of exchange on H. & Co., who accepted it on the 4th July. The bill was indorsed by L. & Co. on 9th July, and discounted by the Bank of Australasia on the 11th.

L. & Co. suspended payment on the 5th July, being indebted to the Bank to the extent of £5,000; but the estate was not sequestrated until September following.

H. & Co., in an action by the Bank, pleaded that L. & Co. were insolvent at the date of indorsement, and that the Bank were aware of that fact; and that they (H & Co.) were, at the time, creditors of L. & Co., who had committed a preference by indorsing the bill to the Bank within the meaning of s. 8 of 5 Vic., No. 17, for the purpose of reducing their debt to the Bank.

Held, that there was no evidence that the Bank had notice of the insolvency at the date of the indorsement, and that the plea was bad.

Held also, that the words "having the effect of preferring any existing creditor" in s. 8 of the *Insolvency Act*, 5 Vict., No. 17, indicate a fraudulent preference, and that there was nothing in the case to shew either fraud or a preference.

Appeal from a judgment of Lutwyche, J., to the Judicial Committee of the Privy Council—Lord Kingsdon, Knight Bruce, Turner, L. J. J., and Sir Edward Ryan.

The facts appear fully in the judgment of the learned Judges.

NOTE.—See also 15 Moo. P.C.C. 97; 8 Jur. (N.S.) 181; 10 W.R., 383.

Judgment was delivered as follows:—

The action in the Supreme Court at Moreton Bay, the verdict and judgment in which have produced the present appeal, was brought up on the 7th of October, 1859, by the appellants on a bill of exchange for £1,336 8s. 3d, which, though dated 1st July, 1859, was drawn on or before the 28th of June in that year, payable 3 months after date, to the order of Messrs. Lloyd & Co., of Sydney, the drawers. The respondents, gentlemen in trade at Brisbane, Moreton Bay, were the drawees, and were the defendants in the action. The bill was placed by Lloyd & Co. on the 28th of June, 1859, at Sydney, in the hands of the appellants, their bankers, and was on the following day transmitted by the appellants to Brisbane for acceptance by the respondents, who accepted it accordingly on the 3rd or 4th of July, 1859. The appellants, on the 8th of the same month, received it back from Brisbane thus accepted, and it was afterwards, while in their hands, indorsed (generally) by Lloyd & Co on the 9th or 10th of the same month. It was formally discounted by the appellants on the 11th of that month, and the produce passed to the credit of Lloyd & Co, in account with the appellants accordingly. They thus became, at least as between them and Lloyd & Co., the absolute owners of the bill for valuable and full consideration, whether by a title commencing before the 2nd July, 1859 (though there was not any indorsement before the 9th or 10th of that month), or commencing at a later day. It may be taken that Lloyd & Co. stopped payment, or suspended their payments on the 5th of the same July. They were at the time indebted to the appellants in £5,000 or upwards. The estate of Lloyd & Co. was not sequestrated until a day in September, 1859; it was then judicially sequestrated for the benefit of their creditors by the Supreme Court of New South Wales. This, for all or many purposes, was equivalent to bankruptcy. During the intermediate time they had continued, to a certain extent, to transact business, notwithstanding the stoppage or suspension. The pleadings in the action are stated in the 4th and 5th pages of the printed record of proceedings. To the declaration, one in the ordinary form by the appellants as indorsees, the pleas of the respondents were thus:—

"The defendants, by William Rawlins, their attorney, as to the first count of the declaration say, that before and at the time the said bill of exchange was indorsed by the said George A. Lloyd & Co.

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to the plaintiffs, as in the declaration mentioned, the said G. A. Lloyd & Co. were insolvent, of which the plaintiffs then had notice.

"And the defendants further say that the said G. A. Lloyd & Co., then being insolvent as aforesaid, and then also being indebted to the plaintiffs in a sum larger than the said sum of £1,336 8s. 3d., indorsed the said bill of exchange to the plaintiffs, in order that the said bill of exchange might be discounted by the plaintiffs, for the sole purpose of enabling the plaintiffs to apply the proceeds thereof in reduction of their said debt.

"And the defendants further say that the plaintiffs, then well knowing the premises, did discount the said bill of exchange for the said G. A. Lloyd & Co. for the purpose aforesaid, and did then apply the proceeds thereof in reduction of their said debt as aforesaid.

"And the defendants further say, that before and at the time the said bill of exchange was indorsed by the said G. A. Lloyd & Co. to the plaintiffs as aforesaid, they, the defendants, were creditors of the said G. A. Lloyd & Co., to an amount larger than the said sum of £1,336 8s. 3d., and other persons were then also creditors of the said G. A. Lloyd & Co.

"And the defendants further say that the estate of the said G. A. Lloyd & Co. was, by order of the Supreme Court of New South Wales, in its insolvency jurisdiction, sequestrated for the benefit of their creditors.

"And the defendants further say that the said indorsement of the said bill of exchange, by the plaintiffs as aforesaid, and the transfer and delivery of the same to them for the purpose aforesaid, then had the effect of preferring the plaintiffs as creditors of the said G. A. Lloyd & Co. to the defendants and others then also being creditors of the said G. A. Lloyd & Co., by reason of which said premises, and by force of the statute in such case made and provided, the said G. A. Lloyd & Co. had no right to indorse the said bill of exchange to the plaintiffs, and the plaintiffs derived no title through the said G. A. Lloyd & Co., and have no title or interest in the said bill of exchange; and the indorsement of the said G. A. Lloyd & Co. became, and is void, and created no right in the plaintiffs to sue, and the plaintiffs have no right to sue the defendants on the said bill.

"And, as to the residue of the declaration, the defendants say they never were indebted as alleged."

The only defence, therefore, was founded on the alleged insolvency of Lloyd & Co., before and when they indorsed the bill. Issue

having been taken on the pleas, the action came on for trial and witnesses were examined. The learned judge told the jury that the words "being insolvent" in the 8th section of the Colonial *Insolvency Act* (5 Vic, No. 17), must be taken to mean "being unable to pay twenty shillings in the pound," and left to them four questions which, and the answers of the jury, were these:—

"Were G. A. Lloyd & Co. insolvent at the time when the note was addressed to the bank on the 9th of July? Yes.

"Were they insolvent on the 27th June and from that time to the 9th of July? Yes.

"Was the note given to the bank on the 28th June to secure the repayment of an overdraft to the extent of £5,000 between that date and the 1st of July? No.

"Was any agreement made on the 1st July that the note should be held to secure repayment of an overdraft to same extent between 1st and 4th July? No."

"Verdict to be entered for defendants, with liberty reserved for plaintiffs to move to set that verdict aside, and to enter a verdict for plaintiffs."

Whereupon the verdict was, under the learned judge's direction, entered for the defendants, with liberty for the plaintiffs to move to set it aside and to enter a verdict for the plaintiffs. This application was made and refused, and hence the appeal.

The main or only questions are, whether the alleged facts stated in the first plea are true, and whether, if true, they formed a good ground of defence to the action; and their lordships are of opinion that both these questions ought to be answered in the negative; even assuming, which is the view most favourable to the respondents, that the word "preferring," as used in the special plea, ought to have the same meaning attributed to it, as ought to be attributed to that word as used in the Act of Parliament, a point on which their lordships give no opinion.

Their lordships consider it impossible to construe the words "having the effect of preferring any then existing creditor," contained in section 8 of the Colonial *Insolvency Act*, read as that section must be in connection with the rest of the Act, and particularly with its 5th, 6th, 7th, 9th, and 12th sections, in the manner for which the respondents contend. The better opinion, they think, is that, according to the true construction of the Act, those words indicate fraudulent preference, and were not intended to refer to any case of preference

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not fraudulent; but whether this be so or not, in the full sense of fraudulent preference as generally understood, their lordships are satisfied that the words in question were not intended, and ought not to be construed, to extend to a case in which not only there was no intention to prefer, but in which the preference (if such there were) arose merely from the circumstance that Harris & Co., when they accepted the bill, were creditors of Lloyd & Co., whereas by accepting the bill they had represented themselves to be debtors, and had authorised third persons dealing with the bill to consider them as such.

In their lordships' judgment, the expression "had the effect of preferring the plaintiffs" contained in the special plea, if to be construed as not embodying any allegation or suggestion of fraudulent preference, or of some preference beyond what is above referred to, is immaterial, but if to be considered as embodying such an allegation or such a suggestion, is not supported by the evidence. Their lordships, however, do not consider the words to embody such an allegation or such a suggestion. They think it also not proved that, before the 5th of July, 1859, the appellants had notice of the insolvency, if any, of Lloyd & Co., or that in fact the appellants had any such notice, or any notice of the suspension of payments before August or September of that year. There is, in their lordships' opinion, nothing in the evidence to show or lead to the inference that the delivery or indorsement of the bill to the appellants by Lloyd & Co., or the discount of the 11th July, was by way of fraudulent preference, or was otherwise than a fair transaction in the ordinary course of business.

In their lordships' opinion, the respondents have wholly failed to show that the delivery of the bill to the appellants on the 28th of June, or its subsequent indorsement, was an unfair or improper transaction, or was avoided by reason that at each of those times the estate of Lloyd & Co. was insufficient to pay their creditors in full. They consider also that the case is not affected in any way by the sequestration of September; nor does it, indeed, appear that any claim has, under that sequestration, been made against either the appellants or the respondents.

Their lordships, repeating, however, that they consider the first plea to be essentially bad, think the appellants entitled to judgment in the action and to their costs here; and their lordships will report to her Majesty accordingly.

R. *v.* ZAHN, *Ex parte* ZAHN.

1862.
10th, 19th June.
Lutwyche, J.

Masters and Servants Act of 1861 (25 Vic., No. 11), ss. 2. 3.—Absence from hired service—Blacksmith—Evidence of agreement—Form of warrant of commitment—11 and 12 Vic., c. 43, ss. 17, 21—Habeas Corpus.

A blacksmith is a servant within the meaning of the *Masters and Servants Act of 1861.*

A warrant of commitment of a defendant convicted of absenting himself without leave or lawful excuse from his hired service, did not recite that the defendant had been "duly convicted" of such offence, but merely stated that he did so absent himself.

Held that the warrant of commitment was bad, and that the defendant must be discharged.

APPLICATION on behalf of Moritz Zahn to make absolute an order *nisi* against J. C. White and others, justices, for a writ of prohibition to restrain further proceedings on an order of the said justices whereby the applicant was convicted of absenting himself without leave or lawful excuse from his hired service, and for a writ of *habeas corpus* directing him to be brought up and discharged.

The grounds of the application, and the necessary facts, with the argument of counsel, are fully set out in the judgment of the learned Judge.

Blakeney to move the rule absolute.

Pring, A. G., for the justices, to show cause.

C. A. V.

19th June, 1862.

LUTWYCHE, J. A rule *nisi* for a writ of prohibition having been obtained by Mr. Blakeney, cause was shown against it by the Attorney-General on the 10th instant, and as the points then raised were of some importance in regard to the administration of justice in the interior, judgment was reserved in order that the decision of the Court might be reduced to writing. Moritz Zahn was convicted at Drayton on the 16th day of May last, under the 3rd section of the *Masters and Servants Act of 1861*, for having absented himself without leave or lawful excuse from the hired service of Messrs. Maclean & Beit. Zahn was hired for two years as a blacksmith, and

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the agreement between him and his employers was stated on the face of the proceedings to be in writing, but did not appear to have been produced before the magistrate. The rule *nisi* was granted on three grounds, viz.:—1. That Zahn was not a servant within the meaning of the *Masters and Servants Act*. 2. That the conviction did not allege that Zahn was such servant. 3. That there was no evidence to warrant the conviction. In support of the first ground, it was argued that as the word "blacksmith" does not occur in the interpretation clause of the Act (s. 2), Zahn was not a servant within the contemplation of the Act. But to this objection against the validity of the conviction, the right answer was given by the Attorney-General, who pointed out that the clause specified both "artificers" and "handicraftsmen," either of which description would include a blacksmith. An artificer is defined to be "one whose occupation requires skill or knowledge of a particular kind, as a silversmith, or saddler." If a worker in silver be an artificer, so also is a worker in iron. The term "handicraftsman" is still more general in its application—"a man skilled or *employed* in manual occupation."

The second ground for the rule appears also to be untenable. It is true the conviction does not allege that Zahn was serving Messrs. Maclean & Beit in any capacity; but it describes him as a blacksmith, and states he was convicted of absenting himself from his hired service. The conviction thereon, if it does not exactly follow the form given in the schedule (I, No. 1) to the Act 11 and 12 Vic., c. 43, appears to be to the like effect, and so to satisfy the requirements of s. 17 of that statute

On the third ground there is more room for doubt whether the conviction ought to be sustained. The best, and therefore the proper evidence of the contract of hiring and service, namely, the written agreement, was not produced, and parol evidence of its contents was received. No objection, however, was made to the reception of parol evidence by the professional adviser of Zahn; and I think I must hold that, under such circumstances, the objection now comes too late. Perhaps, he was aware that it was useless to urge the objection, as the writing could either be produced, or might be shewn to have been lost or destroyed, so as to put in secondary evidence of its contents. But, however that may be, I think it would be very prejudicial to the administration of justice if professional men were encouraged to keep their objections in reserve, when, by making them before the magistrates, they might be at once met and answered.

In coming to this conclusion, I must not be understood to decide that a conviction may be sustained by any sort of evidence which the magistrates may think admissible, if its admissibility be not questioned before them. Such a decision would operate with great hardship upon a man who might not be able to pay for professional assistance, and might even press unduly upon legal practitioners in some instances. It is enough to say that, in the present case, the grounds upon which the rule was obtained are not sufficient, in my opinion, to invalidate the conviction, and the rule for a prohibition is accordingly discharged.

Mr. Blakeney applied, after the arguments relating to the writ of prohibition had been heard, for a writ of *habeas corpus*, in order that Zahn might be brought up and discharged, on the ground that the warrant of commitment was insufficient. The writ was granted, and Zahn was brought up before me, with the warrant of commitment, which, instead of following the directions given by s. 21 of 11 and 12 Vic., c. 43, and by the form (N. 5), and reciting that Zahn had been "duly convicted" for absenting himself from the hired service of his employers, merely stated that he did so absent himself—a statement perfectly consistent with the supposition that legal proceedings might not have been taken against him. It is true that proceedings were taken, and a conviction obtained, but a good conviction will not help a bad warrant of commitment (*Wickes v. Clutterbuck*, 2 Bing. 483). Zahn was accordingly discharged from custody.

KNOX *v.* COCKBURN.

Sale of goods—Liability of Auctioneer—Set off by third person—Mutual credit—Assignment of a chose in action—5 Vic., No. 9, s. 37,—6 Geo. IV, c. 16, s. 63.

1862.
28th May.
25th July.

Lutwyche, J.

C., an auctioneer, was employed to sell certain goods for R. C. & Co., who subsequently executed a deed of assignment to plaintiffs under 5 Vic., No. 9. Before the assignment C. sold some of the goods to C. & F. who claimed to set-off the value of the goods against a debt due to them by R. C. & Co. To an action by plaintiffs against C. for breach of duty in failing to account for these goods or their proceeds, C. pleaded the set-off claimed by C. & F.

Held that it is the duty of an auctioneer, in the absence of a stipulation to the contrary, to sell for cash, and his liability to his employers is not affected by the fact the goods are sold to a person to whom the employer is indebted at the time of the sale, and that the plea was bad.

An equitable set-off, independently of the statutes of set-off, only arises where there is a mutual credit between the parties.

Williams v. Millington, 1 H. Bl. 81 followed.

Bulgin v. McCabe, 3rd September, 1859, distinguished.

DEMURRER by plaintiffs, Edward Knox, John Alexander Saunders, and Geoffrey Eager, to a plea by defendant, Henry Montague Cockburn, to plaintiffs' declaration in an action against defendant for breach of duty as an auctioneer in failing to render an account of goods delivered to him for sale, or of the monies arising from the sale of such goods.

The declaration and the plea in defence appear sufficiently in the judgment of the learned Judge.

Pring, A. G., in support of the demurrer.

Lilley in support of the plea.

Pring, A. G.: The duty of an auctioneer is clearly to sell for cash unless he is otherwise expressly instructed, and the defendant is not entitled to rely on the claim for set-off made by the purchasers against his principal.

Lilley: Unless it appears that the sets-off of the purchasers were let in by some wrongful act of the defendant, defendant is entitled to judgment. The right of indemnity in all transactions between principal and agent only arises where loss has occurred by the wrong of the agent. Here defendant's instructions were to sell and deliver, which he did, and was then met by these claims for set-off.

As he could not have demanded payment before delivery, no blame attaches to his action. Furthermore, the plaintiffs or the persons they represent, have received the full benefit of these sets-off, and there has been no actual loss.

It has been laid down that in all cases of mutual credit in equity a balance only should be paid (Story's Jurisprudence, ss. 1435, n.). If judgment is given for plaintiffs they will be paid twice over, which is contrary to natural equity, conscience, and good sense.

LUTWYCHE, J. In *Williams v. Millington* (2 H. Bl. 81), it is stated in the judgment of Lord Loughborough:—"In the common course of auctions there is no delivery without actual payment; if it be otherwise the auctioneer gives credit to the vendee entirely at his own risk."

Lilley: Yes, but we run no risk because no loss has accrued. If we were called into a court of equity to account, these sets-off would be allowed us on account.

He also cited *Bulgin v. McCabe* (3rd September, 1859).

Pring: The case of *Williams v. Millington* disposes of the point raised as to the necessity for delivery before payment, and clearly establishes that an auctioneer must sell for cash. Besides, in this case there was no mutuality of contract, or mutual trust between the parties. The purchasers had their common law right to sue the vendors, and as that existed the defendant cannot here plead an equitable set-off. By so doing he not only shields himself but advantages a third party.

C. A. V.

25th July, 1862.

LUTWYCHE, J. This case came before the court last Term upon a demurrer to a plea which had been pleaded for a defence on equitable grounds, but as it appeared to me, after the argument had been concluded, that some doubt might exist as to the right of the plaintiffs to sue, I desired that the case might be re-argued upon this point, which was accordingly done. The action was brought by the plaintiffs, as trustees of all the estate and effects of Raymond, Cameron & Co., under a deed of assignment made according to the provisions of the Act of Council, 5 Vic., No. 9, to recover damages from the defendant, an auctioneer, for an alleged breach of duty in not rendering an account of goods delivered to him by Raymond, Cameron & Co. for sale by auction, or of the moneys arising from the sale. The defendant pleaded that before the making of the said deed of assignment, he sold

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some of the goods by auction, and delivered them to Messrs. Cribb & Foote for £102 17s. 7d ; that Raymond, Cameron & Co. were at that time indebted to Cribb & Foote in the sum of £100 7s. 2d., and that Cribb & Foote offered to set-off that amount, and paid defendant the balance which the plaintiffs received; that Cribb & Foote refused to pay the defendant the sum of £100 7s. 2d., and that the defendant rendered an account of the premises to the plaintiffs before the commencement of the suit. There was another plea, similar in its terms, relating to other goods sold for £7 17s.

As the goods were sold before the execution of the deed of assignment, it became important to consider whether *a chose in action*, like a right to recover damages for a breach of contract, passed by the assignment to the plaintiffs under the 37th section of 5 Vic., No, 9.

It is quite clear that the assignees would have had no title to sue at common law, and that the language of the section in question is far from being so plain as it might have been if the legislature intended that the assignees should stand in the same position as the debtor before the assignment. It enacts that after the assignment has been executed, "all and singular the property of the debtor having the executed such deed, of any description whatsoever, and all his rights and credits, including all debts due to him, shall be absolutely vested in the trustee or trustees therein named." Stopping there, and conceding that the word "rights" in this portion of the clause must be taken to embrace rights of action, it does not follow that a right to sue accompanies the "vesting" of such right of action in the assignees. A *cestui que trust* has a vested beneficial interest in an estate in fee simple devised to him by will; but he could not maintain an action of trespass in his own name; he must sue in the name of his trustee. The section goes on, however, to enact that such trustee or trustees may recover all such property, and sue for and recover all such debts in his or their own name or names, thus excluding, apparently, the trustees from suing in their own names in respect of "rights and credits" of the debtor. In the absence, therefore, of any direct decision, I should have been disposed to adhere to the strict rule of construction, and to have held that the right of action did not pass to the assignees; but I find some English authorities upon the *Bankruptcy Act* (6 Geo. 4, c. 16, s. 63), which seem to justify a different interpretation. The words "all the present and future personal estate of the bankrupt" have been held to be sufficiently ample to include *a chose in action* arising out of any breach of contract, not

purely of a personal nature, such as a promise to marry (*Wright v. Fairfield*, 2 B. & Ad. 727; *Drake v. Beckham*, 2 H. L. C. 579, affirming the judgment of the Exchequer chamber 11 M. & W. 315, by which the judgment of the Court of Exchequer, 8 M. & W. 746, was overruled).

The principle to be collected from those cases is that all the personal estate of the bankrupt which can be turned to profit vests in the assignee; and I think that the word "property," in the latter portion of s. 37 of 5 Vic., No. 9, may fairly be considered as equivalent to "personal estate." Upon the whole, therefore, I have come to the conclusion that the right of action in this case passed to the trustees under the deed of assignment, and that they are entitled to sue in their own names.

It remains now to examine the sufficiency of the third and fourth pleas, which has been disputed by the demurrer. The defendant is an auctioneer, and it is the duty of every auctioneer, in the absence of stipulations to the contrary, to sell for cash (*Williams v. Millington*, 1 H. Bl. 85, per Lord Loughborough, C.J.). It does not appear from the record as it now stands that the defendant had authority from Raymond & Co. to sell on credit, and, consequently, as he made delivery of the goods without actual payment, he did so entirely at his own risk. It makes no difference in his liability to his employers that the goods were sold to persons to whom Raymond & Co. were indebted at the time of the sale. An equitable set-off, independently of the statutes of set-off, only arises where there is a mutual credit between the parties, by which is to be understood a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on and trusting to such debt as a means of discharging it (Story Eq. Jur., par. 1435). The defendant, however, sets up in his own defence the equitable claims of third parties to a set-off against Raymond & Co., a defence which it is clear that no court of equity could entertain. It was suggested during the argument that, if the Court should be of opinion that the defendant was *primâ facie* bound to sell for cash, the pleas might be amended so as to shew that the defendant had received authority to sell on credit. The defendant will therefore be allowed to amend on the usual terms of payment of costs, otherwise there should be judgment for the plaintiffs.

The case *Bulgin v. McCabe* (3rd September, 1859) was cited on behalf of the defendant, but the point there decided has no application to the present case. There the auctioneer sued on behalf of his prin-

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Lutwyche, J.

cipal, here the auctioneer is sued by his principal. In *Bulgin v. McCabe* it was admitted on the record that the auctioneer was only the nominal plaintiff, and that the real plaintiff was his principal, St. Hill, which distinguishes that case from *Isberg v. Bowden* (8 Ex., 852). This Court accordingly held that a debt due from St. Hill to the defendant might be set off against the price of the goods sold by St. Hill's agent, proceeding upon the general principle that, where an agent sues in his own name, the defendant may avail himself of those defences which would be good as against the principal for whose use the action is brought. Such is the whole scope and extent of the decision in *Bulgin v. McCabe*, which is certainly no authority for the position which seems to have been assumed, that an auctioneer may sell his principal's goods to his principal's creditors without insisting on payment in cash.

McINERNEY *v.* O'NEILL.

1862.
13th August.

Lutwyche, J.

Lodging house keeper—Lien for board on lodger's goods.

Save by express agreement a lodging house keeper has no lien for board on his lodger's goods.

ACTION by David McInerney against Laurence O'Neill for detinue and trover.

Plaintiff, who had been a lodger at defendant's lodging house, failed to pay his board, and demanded from defendant certain goods which had been left by him in the lodging house. Defendant refused to deliver the goods without payment of the amount due for plaintiff's board, and, after advertising the goods, sold them by auction.

Lilley for plaintiff.

Gore Jones for defendant.

LUTWYCHE, J., directed the jury that, unless by agreement, a lodging house keeper has no lien upon the goods of a lodger, and expressed his wish that the direction should be well understood, as there frequently appeared advertisements in newspapers from the keepers of lodging houses threatening to sell the goods of their lodgers, which are in themselves illegal, unless there was a previous agreement that there should be a lien upon such goods.

Verdict for plaintiff.

PURSER *v.* HALLORAN.

1862.
3rd December,
16th December.

Lutwyche, J.

Sale of land—Defect of title—Misrepresentation—Voluntary Settlement—Advancement to son—Remedy at law—Rescission.

H purchased two allotments of land, one in his own name, and the other in that of his infant son. He then sold the land, and agreed to sign a conveyance of the same, to be prepared by the vendee. The vendee paid the money, entered into possession, and died before a conveyance was executed.

The vendee's executors filed a bill to declare the agreement void, and for a decree for the return of the purchase money with interest; and charged the defendant with fraud and misrepresentation in being aware of his inability to make a good title.

Held, that the purchase of the allotment in the name of his son was, in the absence of evidence to the contrary, to be deemed an advancement to such son.

A good title means such a title as a court of equity will compel a purchaser to accept. A purchaser will not be compelled to take a title to land which has, prior to the sale to him, been made the subject of a voluntary settlement by the vendor.

In the event of a vendor proving not to have a good title to land, the consequent breach of a contract by him for the sale of such land does not amount to constructive fraud, and the vendee's remedy is by action-at-law and not in equity.

Smith v. Garland (2 Mer. 123); and *Sainsbury v. Jones* (5 My. & C. 1), followed.
Devoy v. Devoy (26 L. J. Ch. 290), discussed.
Barton v. Van Heythusen (11 Hare, 8, 126), distinguished.

ACTION by Purser and another, as trustees of the will of Charles Hickson, against Halloran, for the avoidance and cancellation of an agreement for the sale of land, and for an account.

Pring, A. G., for the plaintiffs.

Lilley for the defendant.

The facts and arguments appear in the judgment of the learned Judge.

C. A. V.

16th December.

LUTWYCHE, J. The bill, in this suit, was filed by the plaintiffs, trustees and executors under the will of Charles Hickson, late of Maryborough, praying that an agreement made on the 16th June, 1856, between Hickson and the defendant for the sale of two allotments of land, might be declared void and be cancelled; that the defendant might be decreed to pay to the plaintiffs the whole of the purchase money paid by Hickson to the defendant, together with interest thereon; that an account might be taken of all sums

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expended by Hickson in the cultivation and improvement of the land, and that the defendant might be decreed to pay the same to the plaintiff, and for further relief. The bill charged that the defendant, at the time when he entered into the agreement, was aware of his inability to make a good title to the land, and that he induced Hickson to enter into the contract and to pay the purchase money, through fraud and misrepresentation. The defendant, by his answer, admitted some of the facts charged by the bill, but denied others; and the case came before the Court, on a motion by the Attorney-General, for a decree or decretal order according to the prayer of the bill pursuant to the terms of s. 15 of the *Equity Practice Act*, 17 Vic., No. 7. No affidavits were filed in support of, or in opposition to, the motion; and the only evidence before the Court, therefore, is that afforded by the defendant's answer, which, for the purpose of the motion, must be treated as an affidavit.

The answer of the defendant set forth the following statement of facts:—On or about the 12th October, 1853, the defendant purchased from the Crown, at a sale of waste lands, allotments 6 and 7 of section 83 in the town of Maryborough, paying the deposit money on allotment 6 in his own name, and on allotment 7 in the name of his son, then about four years old, the defendant not intending to debar himself from selling allotment 7, if a favourable opportunity offered. The defendant afterwards paid the residue of the purchase money, and took receipts from the Crown, the receipt for the purchase money of allotment 7 being made out in the name of his son by the direction of the defendant and at his request; but, although the defendant admitted that the purchase was made in his infant son's name, he denied that it was made on his behalf. On the 11th May, 1854, grants from the Crown were issued of allotments 6 and 7, the grant of No. 6 being made out to the defendant, and allotment No. 7 being granted in the name of the defendant's son. On 1st May, 1856, the defendant sold the two allotments to Hickson for £60, which Hickson thereupon paid to the defendant, and on or about the 16th June in the same year he gave Hickson a sale note signed by the defendant, and which note was in the following terms:—

"I have this day sold to Charles Hickson, of Maryborough, in the colony of New South Wales, blacksmith, allotments 6 and 7 of section 83, for the sum of sixty pounds (£60), which said sum I hereby acknowledge to have received from the said Charles Hickson, and I hereby promise and agree for myself, my heirs, executors, and

administrators to sign a regular legal conveyance of the same, to be prepared at the expense of the said Charles Hickson."

Hickson entered into possession and occupation of the allotments after the sale, and continued in such occupation till the time of his death; but there was no proof that he laid out any money in improvements, and the defendant swore, to his belief, that no money was expended by him for such purposes. Hickson did not, during his lifetime, prepare or tender for execution to the defendant a conveyance of the allotments, nor have the plaintiffs done so since Hickson's death, but they asked the defendant if he was able to make out a good title or any title to the allotments, and, if so, to convey them to the plaintiffs. To this the defendant replied by letter, dated 1st June, 1861, stating that "he was prepared to sign any conveyance or such other deed as might be necessary to convey the allotments to the plaintiffs, as Hickson's executors (in which his son would join), when presented to him for execution." In a subsequent letter, dated 21st June, 1861, the defendant said, "I give you notice that I am ready and willing to transfer my equitable estate to you as representatives of Charles Hickson, now deceased, in the premises sold by me to him, and situated at Maryborough; and that I am ready and willing to execute a covenant that my son, in whom the legal estate in the said premises is vested, shall convey the same to you when he attains the age of twenty-one years, which will be in the month of October, 1870." In a third letter addressed to the plaintiff's solicitors, and dated 11th October, 1861, the defendant offered to execute, when required, a conveyance of allotment 6 granted to him in his own name, and to transfer his equitable interest in allotment 7 to the plaintiffs, giving them also a bond, for a sum to be agreed upon, conditioned to be void on his son's conveying the legal estate on his attaining the age of twenty-one.

The defendant, by his answer, distinctly denies that he ever represented to Hickson that he was seised of the land in fee simple, and able to make a good title thereto, or that he ever informed the plaintiffs that allotment 7 was purchased on behalf of his infant son.

Such is the shape in which the matter now comes before the Court, and in disposing of it the first question which arises is this:—Did the purchase of allotment 7 by Mr. Halloran, under the circumstances disclosed in the answer, operate as an advancement in favour of his infant son or not? The authorities on the point are all collected in

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the able note to *Dyer v. Dyer* (1 White & Tudor, L. C. 177). *Byers v. Brown*, decided by the Supreme Court of New South Wales in 1859, and *Barton v. Van Heythuson* (11 Hare, 126), are plainly distinguishable in their circumstances from the present case, and afford no light in the dealing with it. In both of these cases a conveyance had been executed by the person who advanced the money for the land to a purchaser for a valuable consideration, and the point decided was that, as against the latter, a previous voluntary conveyance was inoperative and void under 27 Eliz., c. 4. It was contended at the bar that, as Mr. Halloran could defeat at any time the title of his son to the land, by executing a conveyance to a purchaser for a valuable consideration, he had a good title himself; but a good title means such a title as a court of equity will compel a purchaser to accept, and it was admitted that a purchaser cannot be compelled to take a title when a voluntary settlement has been made by the vendor (*Smith v. Garland*, 2 Mer. 123). We come, therefore, to the advancement, concerning which the law appears to me to be very plain, notwithstanding some observations made by Stuart, V. C., in *Devoy v. Devoy* (26 L. J., Ch. 290; 3 Jur., N.S. 79), which will be referred to presently.

Where a purchase is made by a parent in the name of a child, a presumption arises that an advancement was intended; but that presumption may be rebutted by evidence, showing that a different object was intended; and the intention is a question for the Court, to be decided on a balance of testimony. Mr. Lilley contended for the defendant (citing Daniell's Ch. Pr., 3rd Ed. 761), that the answer must be taken to be true in all points, and that, as the defendant had sworn that, although he had made the purchase in his son's name, it was not on his son's behalf, and that he did not intend to debar himself from selling allotment 7 if a favourable opportunity offered, the presumption of advancement was rebutted. It is stated, however, by Mr. Daniell, at the top of the next page in his treatise, that there is an exception to this rule of practice upon a motion for a decree, the answer being then treated as an affidavit. A statement on oath, though admissible in evidence, is not necessarily conclusive, and I cannot help thinking that Stuart, V. C., though rightly deciding in *Devoy v. Devoy*, laid too much stress on the representations of a plaintiff in support of his own interest. That decision may be upheld on other grounds, viz.:—The declarations of the wife, which were against her own interest, and the fact that from

the time that the transfer of the stock was made the plaintiff regularly received the dividends, which was as contemporaneous an act of ownership as the nature of the property would admit. In that case also, as in *Stone v. Stone* (3 Jur., N. S. 708), in which the Vice-Chancellor followed his decision in *Devoy v. Devoy*, the evidence went all one way, and full explanations were given to the Court of the peculiar circumstances under which the transfer was made, so as to rebut the presumption of advancement raised by the law. But the defendant in this case does not assign any reason for purchasing in his son's name rather than in his own. If he had purchased one allotment only, and that in the name of an infant son, which is a strong circumstance in favour of advancement being intended (*Lampleigh v. Lampleigh*, 1 P. Wms., p. 111), I think that, in the absence of any explanation of his reasons, I should have been bound to hold that the presumption of law was not rebutted. But when he buys two allotments on the same day, one in his own name, and the other in the name of his son, the inference deducible from his conduct as to his intention at the time is very strong indeed. The burden of proof, in rebutting the presumption of advancement, lies on the father; and I am of opinion that, in his case, the defendant has failed to shew, by such evidence as can be considered satisfactory in a court of equity, that he did not intend to make a provision for his son when he purchased allotment 7 in that son's name.

Taking, then, the purchase of allotment 7 to have operated as an advancement, it is contended for the defendant that the plaintiffs are debarred from the relief which they seek, upon the ground that they have slept upon their rights. But I do not find any evidence of laches which would affect their right to sue as representatives of Hickson. It does not appear that Hickson was ever aware of the defect in the defendant's title; and it is plain that very soon after his death the plaintiffs discovered the flaw, and took measures to repudiate the transaction. I think they were not bound to tender a conveyance to the defendant for execution, when they found he could not make out a good title; and so far, therefore, there was nothing to prevent them coming to this Court and asking for such equitable relief as they might be entitled to.

Another question, however, now arises, and that is whether the remedy of the plaintiffs does not lie at law instead of equity. There is no ground for the equitable jurisdiction of the Court on the matter of account, for there is no evidence that Hickson laid out any money

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in improvements on the land. The actual fraud charged by the bill, and pointed at specifically by the interrogatories is denied by the answer, and, consequently, the plaintiffs have no title to equitable relief on that ground. But it is said that there was constructive fraud. No authority, however, was cited, and I do not believe that any authority can be found to support the naked proposition, that, in the event of a vendor proving not to have a good title, the breach of his contract amounts to a constructive fraud. Upon what ground, then, are the plaintiffs entitled to relief in equity? Mr. Dart (Vend. & Purch., 2nd edition, p. 517) lays down the law, as administered in English Courts, correctly when he says "The only remedy to be obtained in Equity for the non-performance of the contract (of sale) is a decree for specific performance. At one time there was a floating idea in the profession that the Court might award compensation for a non-performance, in the event of the primary relief failing; but the contrary has been settled by modern decisions; nor does it make any difference that compensation is sought, not against the owner of the estate, but against a person who falsely assumes authority to sell." It is plain, on the other hand, that the plaintiffs have a remedy at law. Where there is default on the part of the vendor, the purchaser, as a general rule, may either rescind the contract, and sue for the deposit as for money had and received to his use, or he may affirm the contract, and sue for damages upon the ground of its non-performance, adding the common count for money had and received in respect of the deposit. *Sainsbury v. Jones* (5 My. & Cr., p. 1), which appears to have escaped the attention of counsel, is an authority directly in point against the application; and, following that authority, bearing in mind also that actual fraud was charged and disproved, I must refuse the motion with costs.

In re DOUYERE, *Ex parte* BELL.

1862.
2nd December.

1863.
27th January,
25th February,

Lutwyche, J.

Insolvency—5 Vic., No. 17, sec. 7—"Alienation or transfer"—Conveyance without consideration made within twelve months of sequestration—Alien—Conveyance by alien after marriage in pursuance of verbal articles made before marriage—Wife's equity to a settlement—Promise not in writing—Agreement taken out of the Statute of Frauds by part performance—Statute of Uses (27 Hen. VIII, c. 10).

D., an alien, prior to his marriage with S., agreed by verbal articles to settle on her and the children by her former marriage the proceeds of the intestate estate of her late husband, and after marriage failed to do so; but the moneys of the intestate were treated as belonging to his wife, and were expended by her on certain real estate purchased for her absolutely, and in the indenture of purchase therefor her husband joined. A mistake having been made in the legal form of the deeds, an instrument of trust was prepared on May 17th, 1862, by D. alone, whereby D. granted and released unto the trustees the land in question, to hold the same unto the said trustees and their heirs, to the use of his wife for her life, remainder to the use of the trustees, their heirs, and assigns to the use of the lawful children of D., on the body of his wife begotten, and the heirs of their respective bodies, in equal shares as tenants in common. The estate of D. was sequestrated in 1862. On a motion to set aside the indenture of May 17th, 1862,

Held, that there was no "alienation of transfer" within sec. 7 of 5 Vic., No. 17, and that D's. wife had an equity to a settlement.

Held further, that there had been sufficient part performance of the parol promise to make a settlement, to take the agreement out of the *Statute of Frauds;* and, also, that the conveyance of May 17th, 1862, being made by an alien, was of no effect.

APPLICATION on behalf of Bell, a creditor in the estate of W. P. Douyere, deceased, to make absolute a rule *nisi*, calling upon the Reverend W. McGinty and S. Warham to show cause why an indenture bearing date the 17th May, 1862, and made between W. P. Douyere and E. B. Douyere, his wife, and the said William McGinty and Samuel Warham, should not be set aside.

Lilley moved the rule absolute.

Pring, A. G., showed cause.

The facts and the argument appear fully in the judgment of the learned judge.

C. A. V.

In re DOUYERE,
Ex parte BELL.

Lutwyche, J.

25th February, 1863.

LUTWYCHE, J. This was an application to the Court in its insolvency jurisdiction by rule *nisi*, calling upon the Rev. William McGinty and Samuel Warham to show cause why an indenture made the 17th May, 1862, between W. P. Douyere of the first part, Elizabeth Bridget Douyere, his wife, of the second part, and the said William McGinty and Samuel Warham of the third part, should not be set aside, on the ground that the conveyance was made without valuable consideration and within twelve months preceding the sequestration of the insolvent's estate, and that Bell and his partners, creditors of the estate, were thereby prevented from receiving the full amount of the debt due to them.

The application was made under the 7th section of the Act, 5 Vic., No. 17,* and from the evidence by which the application was supported it appeared that the insolvent married, in 1848, Elizabeth Bridget Scott, a widow, with two infant daughters by her former husband. Douyere is a Frenchman by birth, and has never been naturalised. Mrs. Scott and her two daughters were entitled to share her former husband's intestate estate, consisting principally of horse stock, between them; but it did not appear that letters of administration were ever taken out. On the eve of the marriage between Douyere and Mrs. Scott, Douyere agreed "by verbal articles" that the proceeds of Scott's intestate estate should be invested for the benefit of Mrs. Scott and her children by her former husband. After the marriage between Douyere and Mrs. Scott had taken place, Mrs. Douyere dealt with the property as if it were her separate estate. She kept an account at the bank in her own name, and signed her own cheques. None of her money was ever used in her husband's business, and, if Douyere occasionally borrowed a few pounds from his wife, he always repaid her. He invariably consulted Mrs. Douyere when there was anything to be done with the horse

*5 Vic. No. 17, sec. 7. And be it enacted that all alienations transfers gifts surrenders or delivery of any goods or effects real or personal made by any person after he has contracted any debt and within twelve months preceding the commission of any act of insolvency by him or preceding the sequestration of his estate as insolvent or preceding any time at which it shall be made to appear by proof that he was actually insolvent to any person whatsoever without valuable consideration shall be and are hereby declared to be liable to be set aside on summary application to and by order of the Supreme Court at the instance of any creditor of the said insolvent whose debt was contracted or the cause of whose debt had arisen prior to the making of such alienations transfers gifts or surrenders or deliveries in so far as such creditor would thereby be prevented from receiving the full amount of his said debt.

stock, and he transacted all business relating to it, and took receipts, in his wife's name. So matters seem to have gone on for about twelve years after their marriage, without any steps being taken by Douyere to invest the proceeds of Scott's intestate estate pursuant to the "verbal articles." By indenture dated 13th September, 1860, and made between R. J. Smith of the first part, W. C. Douyere of the second part, and Mrs. Douyere of the third part, after reciting that W. C. Douyere had contracted, on the part of Mrs. Douyere, for the absolute sale to her, by R. J. Smith, of allotment No. 5 of section 30, of the town of Ipswich, for the sum of £300, the said R. J. Smith, at the request and by the direction of W. C. Douyere, testified by his being a party to and executing the deed, granted and sold the said piece or parcel of land, hereditaments, and premises unto Elizabeth Bridget Dowyere and her heirs, to hold to the said E. B. Douyere, to the only proper use and behoof of the said E. B. Douyere, her heirs and assigns for ever. Only a portion of the purchase money, £100, was paid on the execution of the conveyance, but it was sworn, and stands uncontradicted, as a fact in the case, that this money was drawn by Mrs. Douyere herself from money standing in the bank in her own name to pay for the land.

By an indenture, made 8th November, 1860, between W. P. Douyere of the first part, Mrs. Douyere of the second part, and R. J. Smith of the third part, after reciting the indenture of the 13th of September, 1860, and that the whole of the purchase money was not paid in cash, but that in part payment thereof two joint and several promissory notes for £105 and £110 respectively, at six and twelve months' dates, were given to Smith by Mr. and Mrs. Douyere, the allotment in question was mortgaged to Smith as a security for the payment of the promissory notes. The mortgage was executed in due form by Mr. and Mrs. Douyere, her acknowledgment as a married woman having been taken before C. F. Daveney, one of the commissioners appointed by the Court for that purpose. On the 8th April, 1862, the whole of the money due on the promissory notes was paid by Mrs. Douyere out of funds arising from the proceeds of the original horse stock, and she then became entitled, according to the terms of a proviso for redemption contained in the mortgage deed, to a re-conveyance of the premises. Mr. Douyere accordingly applied for the title deeds, on his wife's behalf, to Mr. Macalister, a solicitor at Ipswich, by whose firm the indenture of 13th September, 1860, had been prepared. In answer to the application, Mr. Macalister said that

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Lutwyche, J.

the deeds had not been made out in proper legal form, and that, instead of the premises being conveyed to Mrs. Douyere direct, they ought to have been conveyed to trustees on her behalf, but that he would have another deed or instrument prepared to amend the error. Accordingly, on 17th May, 1862, an indenture was prepared in Mr. Macalister's office, purporting to be made between W. P. Douyere of the first part, Mrs. Douyere of the second part, and the Rev. William McGinty and Samuel Warham of the third part. The deed recited the indenture of 13th September, 1860, and that Mr. and Mrs. Douyere were desirous of making a settlement of the property, and the operative part of the instrument then proceeded to set forth that, in consideration of the natural love and affection of W. P. Douyere for his wife and issue, and for divers other good considerations, he, the said W. P. Douyere, did grant and release unto the said trustees of the third part, and to their heirs, the allotment in question, to hold the same unto the said trustees and their heirs, to the use of the said E. B. Douyere for her life, with remainder "to the use of the said trustees, their heirs and assigns, to the use of all the lawful children of the said W. P. Douyere, on the body of the said E. B. Douyere begotten, or to be begotten, and the heirs of their respective bodies, in equal shares as tenants in common." The only person who executed this deed was W. P. Douyere.

The insolvent's estate was sequestrated on the 24th June, 1862, and, as the estate paid a dividend of less than 7s. 6d. in the pound, it was contended that the deed of the 17th May, 1862, was merely a voluntary settlement, and as such liable to be set aside in favor of creditors under the Colonial Insolvency Act. It was urged also that, as the parol promise made by Douyere before his marriage was to invest the proceeds of Scott's intestate estate for the benefit of his wife and her children by her former husband, the settlement actually made, being in favor of the issue of the existing marriage, did not correspond with the parol promise, and, consequently, that the Court would not connect them, but that the settlement must stand upon its own footing as a mere settlement after marriage.

In support of this latter proposition a case in Levinz was cited, to which I shall refer presently. The Attorney-General, on the other side, contended that, as Douyere was an alien, and as such was incapable of either holding or transferring land, nothing passed by the deed of May, 1862; and, consequently, that no "alienation or transfer," within the terms of the 7th section of the Act 5 Vic., No. 17, had been

effected. Acceding entirely to this view of the law, as it has been long settled that an alien cannot be tenant by the courtesy (*Calvin's Case*, 7 Coke, 25a), I might rest the dismissal of the present application upon that ground alone; but it struck me during the argument that more than one answer might be given to the application, and, upon looking over the papers, I found so much fresh matter, that it may be perhaps useful to take a more extended survey of the case and of the law which applies to it.

Assuming Douyere to have become a naturalised subject after the execution of the deed of September, 1860, and thus to have come into possession of the ordinary rights of a husband over the real property of his wife, the wife's equity to a settlement upon his insolvency is the first point which naturally suggests itself. The wife's right in this respect cannot be questioned (*Sturgis v. Champneys*, 5 Myl. and Cr. 97, where the principal authorities are collected and reviewed), and if the deed of May, 1862, were, as it was represented and treated during the argument, a settlement by Douyere upon his wife and the issue of the marriage, this Court would not interfere in a summary manner to set it aside. In insolvency the Supreme Court exercises a mixed legal and equitable jurisdiction, and if no settlement had been made, and the creditors had been compelled by any circumstances to seek the assistance of the court while sitting in equity, it is clear that such assistance could not have been afforded without first directing that a provision should be made for the wife. It would be manifestly absurd and inconsistent, therefore, for the Court to undo in a summary manner that which, if left undone, equity would have directed to be done.

Again, although a parol promise before marriage to make a settlement upon his wife is not generally binding (*Warden v. Jones*, 26 L. J., N. S. Ch. 427), such a contract may be taken out of the operation of the *Statute of Frauds* by acts of part performance subsequent to the marriage (*Surcombe v. Pinniger*, 3 De G. M. & G. 571). In that case, a father, previous to the marriage of his daughter, told her intended husband that he meant to give certain household property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The Lords Justice held that there had been sufficient part performance of the parol contract to take the case out of the *Statute of Frauds*, Lord Justice Turner observing, "There is a part

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performance by the delivery up of possession to the husband—a fact which has been always held to change the situation and rights of the parties." *Taylor v. Beech* (1 Vesey. Sen., 296), comes even still nearer to the present case. Previous to the defendant's marriage, £500, the property of the wife by a former marriage, was agreed to be assigned to trustees for her separate use during coverture; the agreement was not reduced to writing before the marriage, but the husband suffered the wife to receive the money to her separate use. Lord Hardwicke held that such a part performance of the parol promise took the case out of the *Statute of Frauds*. Here Mrs. Douyere was allowed by her husband to deal with the proceeds of her former husband's intestate estate as if it had been her separate property, and I think that this was a sufficient part performance of the "verbal articles" into which Douyere entered before marriage to make the parol promise equivalent in effect to an ante-nuptial settlement. The case in Levinz *(Sir Ralph Bovy's Case*, 2 Lev., 146) was a dictum, not a decision (per W. Grant, M.R., in *Randall v. Morgan*, 12 Ves., 74), and I am strongly disposed to think that at the present day a court of equity would uphold a post-nuptial settlement if, in any essential particular, it corresponded with a parol promise made before marriage, leaving it open to the parties interested to apply to have the settlement re-formed on points of difference.

It has been stated already that, as the husband is an alien born and not naturalised, the conveyance of May, 1862, had no legal operation; but it may be observed that, if he had been a British subject, the deed would not have carried into effect the intentions of its framer. When the deed of September, 1860, was executed, there was issue living of the marriage, and, from the moment of the acquisition of the property, a husband, under ordinary circumstances, would have become entitled to an estate for life as tenant by the courtesy of England. It appeared desirable to Mrs. Douyere's legal adviser that the fee should be vested in trustees, and that she should have an equitable estate for life, with remainder to the issue of the marriage; to settle the property in this manner, however, the concurrence of the wife would have been necessary, and she did not execute the deed, nor is there anything in the operative part of it which shows that her concurrence was considered necessary. Even if she had concurred, and had executed the deed, she would have had a legal and not an equitable estate for life

by force of the *Statute of Uses* (27 Hen. VIII, c. 10). The deed purports to be a conveyance by the husband alone of the fee, which, if done by feoffment, could have worked a forfeiture of the estate by the courtsey; but being by lease and release would have passed his interest, but nothing beyond the compass of it.

The rule *nisi* must be discharged with costs.

IN RE BAXTER (No. 1).

1863.
20th February.

Lutwyche, J.

Sale of interest in land of heir-at-law—Judgment and execution obtained against heir as executor—Bringing land under the Act—Duty of Registrar-General to issue certificate of title to land improperly taken in execution—Real Property Act of 1861 (25 Vic., No. 14) ss. 14, 19, 25.

The interest of an heir-at-law in land is not affected by a judgment and execution against him as executor.

The Registrar-General, on obtaining the assent of the Master of Titles, is at liberty, without reference to the Supreme Court, to issue certificates of title under s. 19 of the *Real Property Act of 1861*, in cases where land, or any estate or interest therein, appears to have been improperly taken in execution and sold under the process of the Court.

SPECIAL CASE stated under 25 Vic., No. 14, s. 14, by the Master of Titles.

In the year 1863 John Baxter died, seised of certain lands in the parish of South Brisbane, county of Stanley, leaving William Baxter as his heir, who subsequently became the administrator of his estate. William Baxter subsequently appointed Henry Hockings as his attorney, who contracted with one Thomas Stonebridge for the sale of a portion of the said land, and William Baxter ratified the contract. In order to carry out the contract Henry Hockings applied to bring the land under the provisions of the *Real Property Act of 1861*. After advertisements had duly appeared, a caveat was entered on the 18th of September, 1862, by the sheriff, forbidding the bringing of the land in question under the provisions of the *Real Property Act*, by virtue of

IN RE BAXTER (No. 1).

Lutwyche, J.

a writ of *fieri facias*. No further steps in the matter of the caveat having been taken, the caveat, under s. 25 of the Act, lapsed after the expiration of three months from the date of its being entered, and the applicant applied that a certificate of title might be granted to him. It appeared that the judgment, in respect of which the writ of *fi. fa.* had been issued, had been obtained by Coles against William Baxter as executor of the estate, and that the sheriff had proceeded to sell by auction the estate and interest of the defendant in the cause. It was submitted in the case that the estate of John Baxter became vested in William Baxter for his own benefit as heir-at-law, and that as administrator he had no estate or interest therein. Under these circumstances it was submitted that the sale by the sheriff was inoperative and void, and the opinion of the Court was sought upon the question whether the Registrar-General was at liberty, without reference to the Supreme Court, to issue certificates of title under s. 19 of the Act in cases where land, or any estate or interest therein, appeared to have been improperly taken in execution and sold under the process of the Court.

Bramston applied for the opinion of the Court, and referred to the Acts 25 Vic., No. 14, ss. 19, 25; 11 Geo. IV. and 1 Wm. IV., c. 47; and 54 Geo. III., c. 15, s. 4.

LUTWYCHE, J. I am of opinion that, under the circumstances, the sale by the sheriff was invalid, and that the interest of William Baxter as heir-at-law cannot be affected by a judgment obtained against him as executor. I am further of opinion that in such a case, if the Master of Titles is satisfied of the invalidity of the alleged sale of land, the Registrar-General will be perfectly justified in issuing certificates of title to the applicants without application or reference to this Court.

IN RE BAXTER, (No. 2).

1863.
20th, 26th Feb.
Lutwyche, J.

Power of Attorney—Interpretation—General words—Power of sale—Noscitur a sociis—25 Vic., No. 14, s. 14.

On the principle of *noscitur a sociis* certain powers of attorney, the terms of which gave general powers to the attorney, were construed as containing no power of sale.

SPECIAL CASE under 25 Vic., No. 14, s. 14, stated by the Master of Titles, for the opinion of the Court, upon the construction of certain powers of attorney executed by William Baxter, appointing one Henry Hockings his attorney.

The facts and powers of attorney are set out in the judgment.

Bramston sought the opinion of the Court, and submitted that general words in powers of attorney are not to be construed at large, but as giving general powers for the carrying into effect the special purposes for which they were given [*Attwood v. Munnings* (7 B.& C., 278), *Gardner v. Baillie* (6 T. R., 591)]. These powers of attorney were intended only to enable the attorney to establish a title. C. A. V.

26th February, 1863.

LUTWYCHE, J. In 1860 John Baxter died intestate seized of certain lands in Queensland, leaving William Baxter his eldest son and heir-at-law, to whom letters of administration to the estate of his father were subsequently granted. The said William Baxter, by two powers of attorney duly executed and dated respectively the 30th day of January, 1861, and the 4th day of November, 1861 (and which powers of attorney are intended to form part of this case), appointed one Henry Hockings his true and lawful attorney for the purpose therein mentioned. The powers of attorney, which were dated respectively 30th January and 4th November, 1861, were in the following terms:—

1. Know all men by these presents that I, William Baxter, of South Brisbane, heir-at-law of the late John Baxter, of South Brisbane aforesaid, carpenter, deceased, being about to remove to remote parts within the colony of Queensland, and being at present an applicant through Mr. Lilley, my proctor, for letters

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Lutwyche, J.

of administration to the personal estate and effects of the said John Baxter deceased, do hereby make, ordain, nominate, constitute, and appoint Henry Hockings, of South Brisbane, aforesaid, my true and lawful attorney for me, in my name, place, and stead, to transact, manage, and conduct all the affairs, matters, and concerns of and belonging to the said John Baxter deceased, or in which he, the said John Baxter, was in his life time interested, or in which I, as such administrator or heir-at-law as aforesaid, may now or hereafter be interested. And for me and in my name, to ask, demand, sue for, recover and receive of and from all and every person or persons in the said colony of Queensland all such sum and sums of money whatsoever, which now is or are due and owing to the estate of the said John Baxter deceased, or which were due and owing to the said John Baxter during his lifetime, or which may hereafter become due and owing to the said estate until my death or revocation of this power; and for me, and in my name, to take into his possession, custody, or power all effects, goods and chattels of or belonging to the said John Baxter deceased, to deliver up the same, and generally to pay, do, and perform for me, and in my name and stead, all other acts, matters and things in and about performing the aforesaid powers as the said Henry Hockings shall think fit. For witness whereof, I have hereunto set my hand and seal the thirtieth day of January, in the year of our Lord, one thousand eight hundred and sixty-one.

2. To all whom these presents may come, William Baxter, of Orion Downs, in the colony of Queensland, bushman, sends greeting. Whereas the said William Baxter is heir-at-law and next of kin of one John Baxter, late of South Brisbane, in the colony of Queensland, aforesaid, carpenter, deceased; and the said William Baxter has obtained from the Supreme Court of the colony aforesaid letters of administration of the personal estate and effects of the said deceased. And whereas, by a deed poll bearing date the thirtieth day of January last, and under the hand and seal of the said William Baxter, he did, after reciting amongst other things that he was about to settle in remote parts of the said colony, appoint one Henry Hockings, of South Brisbane aforesaid, auctioneer, his attorney, to transact, manage, and conduct all the affairs, matters, and concerns which the said William Baxter as such heir-at-law and administrator as aforesaid should be concerned and interested in; but the said deed poll did not empower the said Henry Hockings as such attorney to enter into and

execute deeds in the behalf of the said William Baxter as such heir-at-law and administrator as aforesaid. And whereas the said William Baxter, being now settled in remote parts of the said colony, is desirous of appointing the said Henry Hockings, his attorney, as well for the purposes hereinafter mentioned as those contained in the said recited deed poll. Now know ye, and these presents witness, that the said William Baxter doth make, ordain, constitute, and appoint the said Henry Hockings to be the true and lawful attorney of him, the said William Baxter, for him and in his name, and as his act and deed to sign, seal, execute, and deliver all deeds and instruments whatsoever which the said William Baxter as such heir-at-law or administrator as aforesaid can or may be called upon or required to sign, seal, execute, and deliver, by any person or persons whomsoever, or which the said Henry Hockings shall be advised that he the said William Baxter may be so required or called upon. And the said William Baxter doth hereby for himself, his heirs, executors, and administrators, agree to ratify and confirm and allow all and whatsoever the said Henry Hockings shall lawfully do or cause to be done in or about the premises by virtue of these presents. And the said William Baxter doth hereby declare that all acts done by his said attorney in pursuance of these presents shall be good, valid, and effectual, notwithstanding the said William Baxter may be dead, or the authority hereby given may be revoked at the time of such acts being done, as if the said William Baxter had been alive, and these presents continued in full force, unless notice of his death, or of such revocation shall have been received, and given to the person or persons concerned or engaged in or a party to such act as aforesaid. In witness whereof the said William Baxter has hereunto set his hand and seal the fourth day of November in the year of our Lord one thousand eight hundred and sixty-one.

The said Henry Hockings, as such attorney as aforesaid, has applied to bring certain lands, the property of the said William Baxter, under the *Real Property Act*, requesting that the certificate of title may be issued to an intending purchaser. The Master of Titles, however, is of the opinion that the said powers of attorney do not extend to authorise a sale by the said Henry Hockings; but before the application is rejected the opinion of this honorable Court is sought on the following question: Whether upon the true interpretation of the above mentioned powers of attorney the authority of the said Henry Hockings extends to the alienation of the lands of the said William Baxter, or is confined to taking all necessary steps

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to establish the title of the said William Baxter as heir-at-law to his father, in and to the several properties of which his said father died seised.

After taking time to look into the powers of attorney and consult the authorities, I have no difficulty in coming to the conclusion that, upon the true construction of the instruments, the authority to Hockings does not extend to the alienation of land belonging to William Baxter. The power of attorney executed on the 30th January, 1861, appears to me to be rather a power to take than to bind. (See per Bayley, J., in *Attwood v. Munnings*, 7 B. & C., 283.) The special powers enumerated in the instrument are confined to matters connected with the collection and management of the personal estate, and, applying the rule *noscitur a sociis*, I doubt whether the general words would give sufficient authority to Hockings to bring ejectment in Baxter's name. At all events they would not enable him to do more than take the necessary steps to establish his principal's title to the realty.

It is plain that Baxter himself thought that the power of attorney of the 30th January, 1861, was a power to take for him, but not to bind him in any way, for by a subsequent power of attorney, executed 4th November, 1861, he authorises Hockings to bind him by the execution of deeds, not, however, of deeds generally, but of such deeds as he might *be called upon as required* to execute in his capacity of administrator or heir-at-law. As owner of the land he would have an option to sell it or keep it, and I do not think that the language of the second power of attorney is sufficiently pointed and precise to enable Hockings to exercise that option on the behalf of his principal.

PORTER *v.* MUNICIPALITY OF BRISBANE.

1863.
27th May.
3rd, 4th July.

Cockle, C. J.
Lutwyche, J.

Wrongful dismissal—Contract—Want of consideration—Indebitatus count—Contract with corporation not under seal.

Where a plaintiff claimed damages for wrongful dismissal from the office of architect and surveyor to a Municipal Council, and by the bye-laws of the Council all permanent appointments were to be made by a majority of votes of the Council, and the salary and remuneration to be fixed for that municipal year, the plaintiff, having failed to prove willingness to accept any remuneration the Council might fix, was non-suited.

Quaere, whether a contract for service as above with a corporation must be under seal.

R. v. Justices of Cumberland, (17 L. J., Q. B. 102), considered.

Elderton v. Emmens (4 C. B. 479) and *Goodman v. Pocock* (15 Q. B. 576) approved.

ACTION by Christopher Porter against the Municipality of Brisbane, claiming, on the first count of declaration, damages sustained by him in consequence of wrongful dismissal from his office of City Surveyor and Architect to the Municipal Council of Brisbane; and, on the second count, for money payable for work and labour done, for money paid, and on an account stated.

To the first count pleas were filed in denial of the allegations, and to the second count payment into Court of £29 3s. 4d. was relied upon to meet the *indebitatus* count, and a general plea was filed of never indebted. On these pleadings issue was joined on the trial of the action on May 19th, before Cockle, C. J., and a jury. A verdict was given by the direction of the Judge for £320 16s. 8d., leave being granted to the defendants to move for a non-suit on any points taken, as well as on points raised on the pleadings, or to reduce the damages to £29 3s. 4d.

The facts proved at the trial were as follows:—

The plaintiff was, in 1860, appointed Surveyor to the Council, and, in February, 1862, he became Architect as well, his salary then being paid monthly, and these monthly payments were made until the end of the year. On March 3rd, 1863, he received a letter of dismissal. He continued in the service of the Council until the end of March, 1863, but never received salary for March, 1863; the letter was

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the only intimation he received. Plaintiff was always ready and willing to perform the duties of the office. In March, 1863, the Council passed a resolution to dismiss the plaintiff. After that the Town Clerk told plaintiff he had a month's salary for him, but this plaintiff refused to take. The municipal year began on February 23rd, 1862. The following bye-laws, confirmed on January 17th, 1860, were proved in evidence:—

1. No permanent appointment shall be made of any officer under the Council until an advertisement has been published in one or more of the local newspapers calling for applications from competent persons to fill such appointments.

2. All such appointments shall be made by a majority of votes of the Council, and the salary or remuneration shall be fixed for that municipal year.

3. On the first meeting after the election of the chairman the Council shall fix the amount of remuneration or salary to be allowed to each officer employed under the Council for the current municipal year.

On May 27th, *Bramston* moved for a rule *nisi* calling on the plaintiff to show cause why a non-suit should not be entered, or the damages reduced to £29 3s. 4d., the sum paid into Court on the *indebitatus* counts, on the following grounds:—(1) That the plaintiff, having taken money out of court on the *indebitatus* counts, could not afterwards proceed on the special count. (2) That there was no evidence of the contract of February 3rd, 1863, or of any contract. (3) That there was no evidence of the alleged contract being under seal, although made with a corporation. (4) That there was a misdirection in the interpretation of the contract, in that the Judge directed the jury that there was a continuing contract. (5) That there was a misdirection as to damages. (6) That there was a mist direction in not leaving the amount of damages to the jury. (7) That the damages were excessive. (8) That the verdict was against the weight of evidence.

The rule was granted on all grounds, except the eighth, on July 3rd, 1863. On the return of the rule—

Pring, A. G., and *Lilley* appeared for the plaintiff to show cause.

Gore-Jones and *Bramston* for defendants.

The following authorities and statutes were cited by counsel:—*Gould v. Oliver* (2 M. & G. 208); *Reg. v. Justices of Cumberland* (17 L. J., Q. B. 102); *Arnold v. Mayor of Poole* (4 M. & G 860);

2 Barnardiston, 121; *Emery v. Webster* (23 L. J., Ex. 9; 24 L. J., Ex. 186); *Elderton v. Emmens* (4 C. B.,479); *Hartley v. Cummings* (17 L. J., C. P. 84); *Pilkington v. Scott* (15 M. & W., 657); Bullen and Leake's Precedents (p. 23); *De Bernardy v. Harding* (8 Ex. 822); Smith's Mercantile Law (5th Edition, 113); *Smart v. The Guardians of the Poor of West Ham Union* (10 Ex., 867); 22 Vic., No. 13, ss. 52, 56, 59.

Cockle, C. J.

COCKLE, C. J. I am of opinion that this rule ought to be made absolute for a non-suit. My opinion, so far as it is a judicial one, is based upon an utter failure of proof of the contract as set out in the declaration. But several other grounds were taken up by one side or the other; and I think I shall best discharge my duty by observing upon those other grounds, carefully guarding myself from expressing any opinion as to the validity of the points raised or opposed, but so speaking as that the present judgment may give rise to no misapprehension hereafter.

The first point on which I would observe is that the plaintiff, having taken the money out of Court on the *indebitatus* counts, cannot proceed on this special ground. In this case I hardly think that question arose or was pointed out in the argument. There is nothing on the face of the pleadings to show that the "work and labour" mentioned in the *indebitatus* count of the declaration was not work and labour, *dehors* the contract set out in the first count. In order to render that objection valid it should have been shown by necessary implication on the face of the pleadings, that the *indebitatus* count was one for work and labour done under a rescinded contract. That was not done, and therefore my judgment is on a different basis from that.

Then, as to the third ground, that there was no evidence of the alleged contract being under seal, but that it was made by the Corporation. And here the argument at the Queensland bar has, I think, given a new complexion to the view that may be taken of the law; and I wish that the argument had been heard by the great English text writer, who is so often mentioned, Taylor. I have the greatest deference for his learning and industry, but I can never concur with him in the principle which he lays down respecting the injustice or the absurdity of the law requiring corporations to make contracts under seal; nor do I think that the rule presses so harshly or seriously as he seems to imagine, because the research of the counsel in this case has brought to light a most important decision directly on the point, and which was unnoticed by

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the text book, and which, had it been present to the text writer's mind, would perhaps have spared him some of the observations he has made on the state of the law. The case of the *Queen v. The Justices of Cumberland* (17 L. J., Q. B. 102) seems to afford strong grounds for argument that appointments in such cases need not be made under seal. I do not say that I am prepared absolutely to reject the argument brought forward by Mr. Bramston on the other hand. He guarded himself by saying that it was a decision that would be respected by any judge. But it did not appear that that case was brought under the notice of Baron Park in the case of *Smart v. Guardians of the Poor of West Ham* (*supra*), and I cannot but regret that such a very important case escaped his attention. I feel very much indebted to that bar whose research has brought the case on the Queensland Judge's notes.

Now the other point—of misdirection—has not yet arisen. It is sufficient for me to say, on that point, that I have read the resolutions of the Council as a positive promise to pay the sum of £350 a year to the plaintiff, and my judgment has been based on a decision given by Lord Chief Justice Earle in the last case in which I was engaged on the Midland Circuit, in the summer of 1862, just before I left England (His Honour cited the case, which he stated was reported in the *Times*). However, that is quite unimportant. I now come to the point that there was no evidence of the contract as set out in the declaration; and while I would have amended, and my excellent colleague too would have been glad to have amended, the declaration by striking out the words "payable monthly," if the declaration so amended would have given a special ground of action, we have come to the conclusion that it is impossible to amend the declaration so as to give a specific ground of action. If anybody thinks otherwise we, the Judges, have the satisfaction of knowing that any such amendment would lead to a non-suit. Still this does not debar the plaintiff from bringing a fresh action, though I would rather he did not do so. I cannot meet in the declaration anything to show that the plaintiff would enter into the service of the defendants to serve them for a year in the capacity of City Surveyor and Architect, "at a salary to be fixed by the Council for the current municipal year," including the "defendants' promise to the plaintiff to retain him in the said service." Now, whatever might be the promise of the defendants, it could only be a valid one when a sufficient consideration for the promise was made on declaration, and a sufficient consideration

for that promise was proved at the trial. There was nothing at all shown of a promise on the part of the plaintiff to do a certain thing. What was the promise suggested? To enter into the services of the defendants at a salary to be fixed by the Municipal Council. That is probably the only amendment that the learned and able counsel on the plaintiff's behalf could make.

As to the meaning of the term "permanent employment" used in the 2nd clause of the Municipal Regulations or Bye-laws, I feel little difficulty because the rule says that "all such appointments" shall be made by the "majority of the votes of the Council," and that the "salary and emoluments" should be fixed for "the municipal year." It was only an appointment that should last for a municipal year, and that is borne out by the bye-law. [His Honour cited the bye-law referred to] What must be the consideration by the plaintiff in order to fix the defendants with liability? The consideration must be that plaintiff would serve the defendants for a year at any salary they might fix. Can it be said that that would be a reasonable interpretation of the bye-laws? Or can it be said that there was any willingness exhibited by the plaintiff to serve the Corporation for a farthing a year? I see nothing on the declaration that shows me that there was that willingness. Unless I can see some evidence of plaintiff's assent in such terms as these, I cannot see that the grounds of the declaration as set out are proved, and that plaintiff has grounds for this action. It was set out in the argument very learnedly that certain declarations had been made by Mr. Dowse, the Town Clerk, and that they must be taken as made by the Council. There is nothing in that. The Court has to do with the commencing service, and the continuing, if the service was an old contract. Was, or was not, the contract, as set out in the declaration, proved at the trial? No. Nor can I see that there was anything shown of the plaintiff's willingness to accede to the terms of the defendants. I am constrained to say that there was nothing shown of the plaintiff's willingness, and, therefore, the rule must be made absolute for a non-suit.

LUTWYCHE, J. I concur in the opinion of the Chief Justice, that the rule must be made absolute. With reference to the first point, it is not necessary for me to say more than that I consider the

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cases of *Elderton v. Emmens* (4 C. B. 479) and *Goodman v. Pocock* (5 Q. B., 576) to be decisive authority as to the facts on which they rely, and whenever any case is brought before me on which they bear I shall give them full weight. As to the proof of the appointment under the common seal of the Corporation, I will be very slow to express any opinion at all, considering the very decisive authorities that have been cited at the bar on one side, with reference to the necessity of such formality at common law ; but, at the same time, I attach very great weight indeed to the decision of Chief Justice Wightman in the case of *Queen v. the Justices of Cumberland.* (17 L. J. Q. B., 102). I wish to reserve to myself the opportunity of fully considering on a future occasion, should a case arise, as to what may be the judgment I shall feel called upon to give. As to the second point, I entirely concur in the observations of the Chief Justice. There was no proof of the contract as alleged in the declaration, no evidence that I can see which shows that the plaintiff was willing to accept any salary the Council might fix for the municipal year; and, that being so, the Bench can safely rest their judgment on that count, and the non-suit must be entered accordingly.

Rule made absolute for a non-suit.

[IN BANCO.]

R. v. BENNETT.

7 & 8 Geo. IV., c. 29, s. 53—False pretences—"Chattel"—Credit.

1863.
21st August.

Cockle, C. J.
Lutwyche, J.

Bread, meat, drink, and refreshments are "chattels" within the meaning of 7 & 8 Geo. IV., c. 29, s. 53.*

CROWN CASE reserved by Lutwyche, J.

Bennett was charged at the Ipswich Assizes with having obtained "bread, meat, drink, and refreshments" from one Jackson Curry by a false pretence. He was found guilty and sentenced, but Lutwyche, J., reserved for the opinion of the Court in Banco the question whether "bread, meat, drink, and refreshments," as charged in the information, were chattels within the meaning of 7 & 8 Geo. IV., c. 29, s. 53.*

Blakeney, for the prisoner, cited *R. v. Gardner* (25 L.J., M.C., 100; *R. v. Kenrick* (5 Q. B., 49); *R. v. Crossley* (2 Moo. & R., 17).

The Court answered the question in the affirmative, and affirmed the conviction.

Pring, A. G., begged the leave of the Court to say that many cases came before him, as grand jury of the colony, similar to this; and he believed in this the real question was that *credit* had been obtained from Jackson Curry.

THE COURT stated they were of opinion that, from the case as stated, even if credit had been obtained, the chattels had also been obtained, and that question would not affect the present case.

* 7 & 8 Geo. IV., c. 29, s. 53. And whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud for remedy thereof be it enacted that if any person shall by any false pretence obtain from any other person any chattel money or valuable security with intent to cheat or defraud any person of the same every such offender shall be guilty of a misdemeanour and being convicted thereof shall be liable at the discretion of the court to be transported beyond the seas for the term of seven years or to suffer such other punishment by fine or imprisonment or by both as the court shall award. Provided always that if upon the trial of any person indicted for such misdemeanour it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny he shall not by reason thereof be entitled to be acquitted of such misdemeanour and no such indictment shall be removable by *certiorari* and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for larceny upon the same facts.—Pring's Stat., p. 344. (But see now 29 Vic., No. 6, s. 94.)

[In Banco.]

Re STOCKDALE.

1863.
25th August.

Lutwyche, J.
Cockle, C. J.

Habeas corpus—Defective warrant of commitment — No offence charged in warrant.

A warrant of commitment must show the offence with which the prisoner is charged.

Application on the return of a writ of *habeas corpus* for the discharge of Frederick Stockdale, a prisoner in Her Majesty's Gaol at Brisbane.

On the return of a writ of *habeas corpus* it appeared that the warrant of commitment produced as an authority for the detention of the prisoner did not set forth any offence, but merely stated that the prisoner had been brought before a bench of magistrates and convicted, and ordered to pay the sum of £20, or in default to be imprisoned for three months in Brisbane Gaol. The warrant concluded by directing the gaoler to safely "keep him until safely delivered by the course of law." It did not appear that any attempt had been made to recover the fine by levy and distress.

No notice of proceedings in the *habeas corpus* was served upon the committing magistrates.

Blakeney, for prisoner: The warrant of commitment is bad, as no charge is stated in it against the prisoner. The words at the conclusion are also strange. They are the common conclusion to a warrant when the prisoner is committed to take his trial. The prisoner is further entitled to his discharge on the ground that the prosecutor should have first proceeded by levy and distress, and that after a return of "nulla bona" was made the prisoner should have been committed. He referred to Plunkett's Australian Magistrate, 241; *Wickes v. Clutterbuck* (2 Bing. 483).

Cockle, C. J. The warrant of commital is clearly bad. No notice has, however, been served upon the committing magistrates; but I think we ought to exercise a discretion as to whether we should hear the matter *ex parte* or not. The warrant might have been returned as a piece of blank paper, and we think it would be a manifest injustice to the prisoner to delay for the purpose of giving notice to magistrates to shew cause why this warrant of commitment should not be held bad. The prisoner must be discharged.

Lutwyche, J. concurred.

In re JAMES SKELTON.

1864.
23rd March.
Cockle, C.J.

16 Vic., No. 19, ss. 7, 38—Vesting order—Death of vendor before conveyance—Devise of land after sale but before conveyance.

S. had purchased certain lands from C., who died before a conveyance was executed. Prior to the sale, and while the lands were in his possession, C. devised them to his infant children.

An order was made vesting the land in S. in fee.

PETITION by James Skelton, under the *Trustees Act, 1852*, for a vesting order.

On the 25th March, 1862, Daniel Corkhill, deceased, by his agent Josiah Millstead, sold the petitioner all Corkhill's right, &c., to a piece of land at Dalby, and a dwelling-house and other improvements thereon, for £190. On the same day the petitioner paid Millstead £150 in cash, and gave a promissory note for £40. Millstead paid £108 19s. to the credit of the deceased at the Bank of New South Wales, and retained the balance in settlement of an account due from Corkhill. Millstead then handed the title deed to the petitioner, who thereupon entered into and continued in possession. On March 26th Corkhill died, having on November 23rd, 1861, made a will, whereby, after other things, he devised the remainder of his estate to his children to be divided. The sole executor renounced probate. On November 7th, 1862, the Court committed to Thomas Hayes Jones, a creditor, administration. The children were all infants. The widow was served on her own behalf and the children (Jarman Ch. Prac., L. 19). Notice was served on T. H Jones by one McIntosh, his attorney.

Lilley, for the petitioner.

COCKLE, C. J., made an order under ss. 7, 38, of 16 Vic., No. 19, vesting the lands in fee in the petitioner.

R. *v.* COLLINS.

1864.
21st July.

Lutwyche, J.

Information—Objection to—Time for objection—Commission of Crown Prosecutor.

A prisoner, arraigned on a charge of murder, pleaded not guilty. His counsel then took objection to the prisoner's trial on the information filed against him, on the ground that it was signed by a Crown Prosecutor who was not acting under a valid commission.

Held, that the objection was taken too late, as the prisoner had already pleaded over.

TRIAL of Michael Collins at the Toowoomba Assizes on a charge of murder.

Blakeney, for the prisoner.

Prisoner, who was indicted for murder, on his arraignment pleaded not guilty.

Blakeney took a preliminary objection to the prisoner's being tried on the information to which he had pleaded, as it had been filed by the Crown Prosecutor, Mr. Gore-Jones, claiming to act under a valid commission from the Governor, whereas the commission was not dated when issued, and the date was only put in by the Attorney-General during the assizes.

LUTWYCHE, J., was of opinion that the objection had been taken too late, as the prisoner had already pleaded over.

PETTIGREW *v.* AUSTRALIAN STEAM NAVIGATION COY., LTD.

Carrier—Gross negligence—Express stipulation—Notice.

[IN BANCO]. 1864. *16th, 26th Aug. 5th Sept.*

Lutwyche, J. Cockle, C.J.

Held that where a carrier is guilty of negligence the terms of a special agreement cannot protect him. His liability does not cease when he lands goods on a wharf; he is protected to some extent (as if a fire broke out and the goods were consumed), but not when the loss arises from gross negligence.

MOTION on behalf of the defendants in an action by Pettigrew against the Australian Steam Navigation Coy., Ltd., for damages for loss of goods entrusted by plaintiff to defendants as carriers, to make absolute a rule *nisi* to enter a non-suit, and for a new trial on the grounds (1) That there was a misdirection of the jury (2) That a pure question of law was left to the jury (3) That there was no evidence of loss of goods during the continuance of the contract to carry, and (4) That the verdict was against the evidence and the weight of evidence.

The action was tried at the Civil Sittings at Ipswich, and the jury found that the defendants had been guilty of gross negligence, and assessed plaintiff's damages at £92. The defendants sheltered themselves behind a receipt exempting them from damage by the negligence of their employees. Judgment was entered for plaintiff for the amount claimed. All the other facts appear in the argument of counsel and the judgment of the learned judge.

Blakeney and *Lilley* to show cause.

Pring, A.G., and *Bale* to move the rule absolute.

Blakeney: The defendants assert that the loss complained of occurred after the contract terminated, but plaintiff submits that the contract continued until goods should have been delivered to the consignees. It was the defendant's duty so to deliver the goods (Powell on the Law of Inland Carriers; *Foreward v. Pollard*, 5 East., 437; *Beck v. Evans*, 16 East., 244; *Wyld v. Pickford*, 8 M. & W., 461.)

LUTWYCHE, J., referred to *Cullen v. Butler* (5 M. & S., 461).

Blakeney: The judgment of Best, J., in *Batson v. Donovan*, (4 B. & A., 29), may further be cited in support of that proposition. Moreover, defendants ought to have given notice to plaintiff of the

PETTIGREW v. AUSTRALIAN STEAM NAVIGATION COY., LTD.

Lutwyche, J. Cockle, C.J.

arrival of the goods, and it has so been held in *Sleat v. Fag* (5 B. & A., 342); and in *Birkett v. Willan* (2 B. & A.,357), it was held that gross negligence rendered the carrier liable for the loss or damage of goods, even when above the value mentioned in his notice and not specially entered and insured. And in *Bodenham v. Bennett* (4 Price, 31) and *Garnett v. Willan* (5 B. & A., 62, 63) it has been similarly decided. There is the further case cited in Powell on Carriers, at pp. 50, 51, of *Bourne v. Gatliffe* (3 Sco., N.R. 1); and also *Beckford v. Crutwell* (5 C. & P., 242). In this latter case Lord Tenterden held that a carrier was liable at common law, notwithstanding the terms of a special contract, for gross negligence, namely:—not taking such reasonable care as the common law imposed upon carriers, and from which not even the notice could protect them. The jury found in this case that defendants were guilty of gross negligence, and there was ample evidence to support that finding. On the point raised that the Judge should have directed the jury that there was no notice of claim as required by the contract, the plaintiff contends that no such notice was necessary, but, on the other hand, it was defendant's duty to give him notice that goods were ready for delivery, and there was, therefore, no misdirection on that point.

Pring, A.G.: The plaintiff sued the defendants on a special contract and not as common carriers. The question is what was that contract—is it valid? The defendants submit that it is, and that under it their liability only existed during the currency of the contract, which terminated four weeks after shipment from Ipswich; and the plaintiff must show that the loss occurred during that time. The contract contained a proviso, which was accepted by the plaintiff, that, in the event of loss, he should give notice of his claim within four weeks of loss; and, as the plaintiff accepted the contract, he was precluded from remedy without such notice (*Phillips v. Clarke*, 26 L. J., C. P. 168, 2 C. B., N. S. 156). The delivery of the goods secured by the contract was effected by landing the goods on the wharf. A carrier may, by special stipulation in a contract, rid himself from the common law liability (*White v. Great Western Railway*, 26 L. J., C. P. 158), and the duty cast upon the plaintiff to make a claim for the goods within four weeks was such a stipulation, as was also the stipulation that the company should not be liable to loss or damage after landing the goods at Sydney. He cited also *Lyon v. Mells*, 5 East, 428.

C. A. V.

September 5th.

PETTIGREW v. AUSTRALIAN STEAM NAVIGATION COY., LTD.

Lutwyche, J.
Cockle, C.J.

The judgment of the Court was delivered by Lutwyche, J., as follows:—

After the most careful examination of the argument on this matter, and after conference, we have come to the conclusion that this rule must be discharged. An action is being brought against the defendants for breach of contract entered into to carry goods from Ipswich to Sydney, and there deliver them to Messrs. Jackson & Hinley. There are two counts in the declaration, and both appear to be in *assumpsit*; although, by their plea of not guilty, the defendants treated the second count as one in *tort*. But the jury found there was gross negligence; therefore, the point which the Attorney-General made, in arguing for the defendants in reference to that, falls to the ground.

Now, looking at the receipt or notice delivered by defendants to plaintiff, and which the plaintiff must be taken to have acquiesced in, by it the defendants undertake to deliver. All the authorities show that when a carrier is guilty of negligence, the terms of a special agreement cannot protect him. *Lyon v. Mells* (5 East, 428), inadvertently cited by the Attorney-General in his own favour, is very strong on the point. There it was held that a carrier by water would be liable for damage arising by leakage, though he had given notice that he would not be answerable for damage unless occasioned by want of ordinary care in the master or crew of the vessel. As I have said, the authorities directly maintain that gross negligence overrides express stipulations; and that it should be so is in harmony with the policy of the law as evidenced by the maxim, "that no man shall take advantage of his own wrong." In *Cullen v. Butler* (5 M. & S. 461), this doctrine is forcibly laid down. In *Phillips v. Clarke* (2 C. B. N. S. 156), the marginal note is:—"A stipulation in a bill of lading that the ship-owner is not to be accountable for breakage or leakage, does not exempt him from responsibility for a loss by these means arising by gross negligence;" and Cockburn, C.J., in giving judgment, quoted from *Dale v. Hall* (1 Wils. 187), where it is laid down that "everything is negligence in a carrier or drayman which the law does not excuse, and he is answerable for goods the instant he receives them into his custody, and in all events, except they happen to be damaged by the Act of God or the King's enemies; and a promise to carry safely is a promise to keep safely."

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The Attorney-General contended that the liability of the Company ceases when they land the goods on the wharf. Their liability does not cease, but they are protected to some extent, as if a fire broke out and they were consumed, but not when loss arises from gross negligence. Indeed, if such were the case, and if landing on the wharf were delivery, the Company would lose their lien, which would perhaps more than counteract the advantages derived from the contrary doctrine. Then, except in cases of goods shipped under a bill of lading, carriers are liable in cases of gross negligence, and are bound to deliver or give notice. It is strange that, so far as I know, this point has never been expressly decided. But these declare from a very remote period. In the 38th year of Elizabeth, Popham, J., in *Storr v. Crowley* (1 Mde. & Yo., 129 at p. 138), said that carriers take upon themselves safely to carry and deliver. In *Golden v. Manning* (2 W. Bl. 916) the same doctrine was enunciated. In *Hyde v. Trent & Mersey Navigation Coy.* (5 T.R., 389), Grose, J., said:—"The law which makes carriers answerable as insurers is indeed a hard law, but it is founded on wisdom, and was established to prevent fraud. But, it seems to me, that it would be of little importance to determine that carriers were liable as insurers, unless they were also bound to see that the goods were carried home to their place of destination, since as many frauds may be practised in the delivery as in the carriage of them."

I referred to bills of lading as exceptions. They are excepted for many reasons. The shipper is simply bound to carry goods from one port to another. The bills of lading are negociable documents, and the property they represent may have been transferred before it arrives. But here the receipt is nothing of the sort—nothing but a mere voucher. The verdict should, therefore, be upheld.

Ex parte KEYSE.

Prohibition—Costs against justices—Costs not asked for in the rule nisi.

[In Banco]. 1864. *7th November.*

Cockle, C. J. Lutwyche, J.

Costs will not be awarded against justices on the granting of a rule absolute for prohibition &c., where they have not been asked for in the rule *nisi*.

APPLICATION on behalf of St. John Keyse to make absolute an order *nisi* calling upon Messrs. Woods and Burnett, justices, to show cause why a writ of prohibition should not go to restrain further proceedings on an order made by them against the applicant.

The rule *nisi* did not ask for costs against the magistrates.

There being no appearance to show cause, the rule was made absolute.

Blakeney, for appellant, asked for costs against the magistrates.

COCKLE, C. J. We cannot give costs against the magistrates as no notification was given them in the rule *nisi* that costs would be asked; for if such notice had been given they might have appeared by counsel against such a demand.

LUTWYCHE, J. concurred.

PETTIGREW *v.* TREDWELL.

[IN BANCO].

1864.
26th November.

Cockle, C.J.
Lutwyche, J.

Promissory note, action on—Satisfaction of promissory note by a second promissory note, made by third party.

To an action to recover money due under a promissory note made by defendant in favour of M., and by M. indorsed to plaintiff, defendant pleaded that M. had, for and on account of the note sued on, made another promissory note in favour of the plaintiff.

Held that the plea was bad.

ACTION to recover money due under a promissory note.

This was an action to recover money due under a promissory note made by defendant in favour of John Murray, and indorsed to plaintiff. The defendant raised the plea appearing in the head note. The plaintiff demurred to the plea.

Blakeney, for the defendant: The debt due by the note has been satisfied in the manner set out in the plea, and therefore the plea must stand. He cited *Bacon v. Searles* (1 H. Bl. 88); *Hemming v. Brook* (1 Car. & M. 57); *David v. Preece* (5 Q. B. 440.)

Bramston, for the plaintiff: The defence pleaded is no defence at law. The defendant being a party to the note, and consequently liable to pay for it, the satisfaction mentioned in the plea must be understood to apply to the liability of the said John Murray as indorsee, and not to the liability of the defendant as maker of the note. Even payment by Murray in cash for the note would not be a good plea. *Jones v. Broadhurst* (9 C. B. 173), *Belshaw v. Bush* (11 C. B. 191.)

Cockle, C. J.: We cannot distinguish this case from *Jones v. Broadhurst* (9 C. B. 173) cited by the learned counsel in favour of the demurrer, and therefore the judgment of the Court must be that the plea is bad.

"THE VERNON."

Judge—Interest of judge in subject matter of action—Consensus tollit errorem.

[Vice Admiralty Court].
1864
8th August.

Cockle, C. J.

In an action to decide the validity of an hypothecation of freight and cargo, the judge, before whom the action came for trial, was one of the consignees of the cargo. At the hearing, counsel for both parties waived any objection on the ground of interest, and the action was accordingly heard and judgment delivered.

Held, that in some few cases, from necessity, an interested person is allowed to adjudicate, it being considered a less evil that he should do so than that a failure of justice should take place.

Held, further, that in the present case the consent of the parties prevented the taint of interest being fatal to the proceedings.

PETITION in the Vice Admiralty Court to enforce an alleged hypothecation of the freight and cargo of the ship "Vernon."

All the material facts appear in the judgment.

Lilley and *Ball* for the promoters.

Pring, A. G., for the defenders.

COCKLE, C. J. It was not until the last sitting of the Court that it occurred to me that I was interested in this matter. A letter to Mr. Stockwell, the Registrar of this Court, dated Brisbane, 28th July, 1864, gives him notice that "The hhd. china, addressed to Chief Justice Cockle, ex "Vernon," can be released from the custody of the Admiralty Court on the requisite bond being signed." And I am not sure that a want of attention to my private affairs has not amounted to an inadvertence, by reason of which this interest did not occur to me before. I think it right, therefore, to recapitulate the proceedings in this suit. A warrant having issued on June 1st, 1864, on June the 8th, I, on the motion of Mr. Lilley, as advocate for the promoters, decreed the unlivering, &c. On June 17th, the Attorney-General, as advocate for consignees of cargo, moved that promoters' proctor be assigned to bring in his act on petition on Tuesday, June 21st, 1864. Mr. Lilley, for the promoters, consented; the Attorney-General consenting to put in his defence on the following Friday, I ordered accordingly. Mr. Lilley then moved that Messrs. Harris & Co., as agents for the owners, pay all freight in

"THE VERNON." Cockle, C. J.

their hands into Court; the Attorney-General consenting, I ordered accordingly. Mr. Lilley also moved for a monition on the captain to bring his log and the ship's papers into Court; I decreed accordingly On June 24th, 1864, Mr. Lilley moved that defendants be assigned to bring in their answer to the act, and the following Wednesday was assigned accordingly, Mr. Lilley stating that the Attorney-General consented. On June 29th, 1864, Mr. Lilley applied for Friday to be assigned for him to reply, and July 1st was assigned accordingly. On July 1st the Court was adjourned by consent to July 2nd. On July 2nd the act on petition, answer, rejoinder, and evidence were read; and the Attorney-General then moved to dismiss the act so far as the same relates to cargo. By consent, the several consignees were to be allowed to release their several portions on giving security. I concluded the act, so far as ship, freight, and cargo belonging to owners (who had entered an appearance by Mr. E. I. C. Browne, their proctor), were concerned. On July 12th I rejected the Attorney-General's application to dismiss the act so far as the same related to cargo, and on the application of Mr. Ball, representing Mr. Lilley, as advocate for promoters, I pronounced that the said vessel, her freight and cargo belonging to the owners, was justly and lawfully hypothecated. On July 20th, on the application of Mr. Lilley, I named the ensuing Monday for hearing argument on final decree as to cargo. On July 25th, on the suggestion of Mr. Lilley (who intimated the concurrence of the Attorney-General and Mr. Ball), I adjourned the Court to the ensuing Monday, August 1st, when on a suggestion, which had been previously made by Mr. Lilley, with the concurrence of the Attorney-General, I further adjourned the Court to the ensuing Wednesday, August 3rd. At the opening of the Court on August 3rd, I stated that I was, I believed, a consignee of cargo. Mr Lilley said that he took no objection on that ground. The Attorney-General left the question for my decision. I adjourned the Court for half-an-hour for consideration. On resuming, Mr. Lilley repeated that he took no objection on the ground of interest, and the Attorney-General said the same. So, by consent, I being (or believing myself) interested, heard the case and arguments. In some few cases, from necessity, an interested party is allowed to adjudicate, it being considered a less evil that he should do so than that there should be a failure of justice altogether. (See Paley on Convictions, 4th edition, p. 38). Under such circumstances, to use the words of Lord Denman (there quoted), "it becomes the unfortunate duty of the Court to act as both party

Cockle, C. J.

and judge." In this case the consent of the advocates will probably prevent the taint of interest from being fatal to the proceedings to this extent:—*consensus tollit errorem*, and the representatives of cargo (other than that belonging to the owners) will not be able to urge as a fatal objection that the Judge was an interested party. I say nothing about how the case stands, so far as relates to the owners of the ship and freight, who are also owners of a portion of the cargo. I take the step which seems to me the best calculated to further the ends of justice. I have recapitulated the events of this suit in order that any persons who think themselves aggrieved may take such steps as they may be advised to take to invalidate these proceedings, or purge them from the taint of interest. Having said thus much, I think I shall best discharge my duty by giving judgment on the points raised. I think that a decree ought to go against the cargo. The point raised by the Attorney-General will, I think, be more properly brought before me at a later stage of the proceedings, and by way of exception to the results arrived at by the Registrar and merchants. At first sight it might appear that the subject matter in aid of which money is to be raised should be itself susceptible of hypothecation. but in *The Duke of Bedford* (see Conkling's U.S. Admiralty, p. 286), Sir Christopher Robinson likened the passengers, to whose subsistence the stores were to be appropriated, to cargo, and the large payment made by them of passage money, to freight. Mr. Lilley seems to suggest that the question is one depending upon notice that the ship is a passenger ship, but, as I said before, I don't think I need decide that question to-day.

STEWART *v.* FITZGERALD.

1865.
14th July.

Lutwyche, J.

Pleading—Delivery of declaration during vacation—Judgment by default—Vacation of judgment.

A judgment for plaintiffs signed for default of plea by defendant, where the declaration had been delivered during vacation, was set aside.

SUMMONS calling upon the plaintiffs to show cause why judgment by default should not be set aside, and all further proceedings should not be stayed, until the plaintiffs have again given security for the payment of the defendant's costs in the action.

In this action the plaintiffs' declaration had been delivered on 10th June, 1865, during the vacation, and on the 12th July judgment was signed against the defendant by default.

Macnish, for the plaintiffs: There is a preliminary objection to the hearing of the summons, namely, that the defendant's application is too late. Judgment has been signed, and there is, therefore, no cause before the Court.

Barrymore, for the defendant: The judgment is a nullity. The declaration was a nullity as it was delivered in vacation. (Chitty's Archibald, vol. 1, p. 138.) The judgment is, therefore, a nullity (*Mills v. Brown*, 9 Dowl, 151; *Sharp v. Fox*, 28 L.T., 127) and cannot be considered. The defendants took no fresh steps after the declaration was delivered, and so cannot be said to have waived the irregularity.

LUTWYCHE, J. Upon the authority of the cases cited I hold the declaration was a nullity and the judgment is bad. I order that the judgment be set aside, and that the plaintiffs give security for costs to the satisfaction of the Registrar; in the meantime let all proceedings be stayed.

Solicitor for plaintiffs: *Macnish.*

Solicitor for defendant: *Barrymore.*

[IN INSOLVENCY.]

In re MARKS, *Ex parte* LEVI, *Ex parte* BANK OF NEW SOUTH WALES.

Promissory note—Re-exchange—Liability of maker.

1865.
17th July.

Lutwyche, J.

Where a promissory note has been indorsed by the payee, the indorsee cannot recover re-exchange from the original maker, but must proceed against the payee.

MOTIONS on behalf of the Bank of New South Wales, and Laurence Levi, for admission of claims against the estate of Marks, an insolvent.

These were claims by creditors in an insolvent estate for re-exchange on promissory notes made by the insolvent and indorsed to them.

All the facts appear in the judgment.

LUTWYCHE, J. In this case a claim was made by Laurence Levi, and also by the Bank of New South Wales, to recover an amount paid for re-exchange on promissory notes against the estate of the insolvent Marks. The claimants are both in the position of indorsees; the insolvent in that of maker. At the time these claims were submitted to me I intimated a strong doubt as to the right of indorsees of a promissory note to recover against the maker. I have since looked into the cases which bear upon the point, and I find that, in the case of a bill of exchange, the acceptor is not liable, but the drawer is (*Napier v. Schneider*, 12 East., 420; *Woolsey v. Crawford*, 2 Camp., 445). In the latter case it was an action on a bill of exchange drawn by J. S. Crawford upon, and accepted by, the defendant in England. The declaration stated that the plaintiff, who was payee of the bill, had indorsed it in Canada, and that, in consequence of its returning to that country dishonoured, he had been compelled to pay to the indorsee £10 per cent. upon the amount as re-exchange, and £6 per cent. interest, together with other charges. Baron Park undertook to prove these facts, and contended that the defendant was answerable for all damage occasioned by the dishonour of the bill. Lord Ellenborough gave judgment:—"You may as well state that, by reason of the bill

ANTILL *v.* SCOTT. not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer; he undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried further than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due." This is the case of the acceptor of a bill of exchange, and the matter of a promissory note stands exactly in the same position. The payee becomes a fresh drawer, and recourse must be had to him for payment of re-exchange. I therefore disallow the claims in both cases.*

ANTILL *v.* SCOTT.

[IN BANCO]. 1865. *4th, 6th Sept.*

Cockle, C. J. Lutwyche, J.

Contract—Conditions rendered impossible by act of law.

Where a condition in a contract, made after the passing of an Act of Parliament and the issue of a proclamation thereunder, is thereby rendered impossible of performance, the non-performance of the condition is not thereby excused.

Melville v. De Wolf (4 E. & B., 844) discussed and distinguished.

DEMURRER by the plaintiff to a plea filed by the defendant in an action for breach of contract.

The declaration of the plaintiff was upon an agreement made on the 20th January, 1864, for that in consideration that the plaintiff would deliver at Strathbogie, on or about the 20th February, 1864, 2,000 sheep, more or less; the defendant agreed to pay for them by certain cattle then *en route* for defendant's station.

To this defendant pleaded: That after the making of the said agreement, and before any breach thereof, the cattle were attacked by a certain malignant disease entitled pleuro-pneumonia, and were prohibited from proceeding out of the district by a proclamation which had the force of law, made in pursuance of an Act of Parliament.

The plaintiff demurred.

* But see now 48 Vic., No. 10, s. 58; and *Re* General South American Company, 7 Ch. D. 637; *Re* Gillespie, *Ex parte* Robarts, 18 Q. B. D. 286; *Re* Commercial Bank of South Australia, 36 Ch. D. 522.

Pring, in support of demurrer: The plea is bad; it confesses, but does not avoid, the cause of action. The Act was in force at the time of the defendant entering into the agreement, and the defendant ought to have made a conditional contract, not an absolute one, as he ought to have known that pleuro-pneumonia might break out, and he would not be able to fulfil his contract. If the Act of Parliament had been passed afterwards the plea might be good. In *Barker v. Hodgson*, (3 M. & S., 267), it was decided that the charterer of a ship who covenants to send a cargo alongside at a foreign port is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port all intercourse is prohibited by the law of the port.

Lilley, *contra*: The cases go to excuse the performance of a contract when it is rendered impossible by act of law or by public authority. Chitty on Contracts, 13th Ed., p. 616; *Doe, dem. Lord Anglesea v. The Churchwardens of Rugely* (6 Q.B., 107); *Davis v. Cary* (15 Q.B., 418); *Brown v. Mayor of London* (9 C.B., N.S., 726); *Melville v. De Wolf* (4 E. & B., 844); *Exposito v. Bowden* (4 E. & B., 963).

C. A. V.

6th September, 1865.

COCKLE, C.J. It is stated in the margin of the demurrer book that the plea to the declaration in this case confesses, but does not avoid, the cause of action. We are clearly of opinion that it does confess the cause of action. The statement that the defendant was unable to deliver is of itself a confession. But to avoid that cause of action, it must appear clearly that the law upon which the defendant bases his defence came into effect subsequently to the execution of the contract. Looking at the plea we must take it for granted that the Act and the proclamation were in force at the time of the contract made. The present case does not come under that class of cases cited by the learned counsel who appeared in support of the plea. He quoted one, however, *Melville v. De Wolf* (4 E. & B., 844), and this, to say the least of it, is a striking case; but we agree that we ought to hesitate before we make a precedent of a case which is somewhat anomalous in the face of a long string of cases. This case is distinguishable from the present in two respects. In the first place the action was then premature; secondly, the rule of law or action taken thereon cut away the consideration upon which the action was founded. There the consideration was not earned; here it was earned. We are,

Ex parte THE BANK OF AUSTRALASIA. *In re* THE REGISTRAR-GENERAL AND THE MASTER OF TITLES.

Lutwyche, J.

therefore, of opinion that, unless the learned counsel for the defendant can show that the Act and proclamation took place after the date of the contract (under which circumstances we shall give leave to amend), judgment must be given for the plaintiff.

LUTWYCHE, J. Whenever a case exactly similar to that of *Melville v. De Wolf* comes before our Court, of course we shall be prepared to pay the greatest attention to it, and act in conformity with it as a precedent; but if, as in the present instance, it stands alone, we shall think it much safer to follow the host of other authorities which have been cited. The defendant entered into this contract with his eyes open. Had the bill not been passed, delivery of the cattle, even if they had the pleuro-pneumonia, would have been a valid delivery in law. The plaintiff had this risk. In the present case there was nothing to prevent the defendant from having placed a clause in the agreement to meet the present case. There will be leave to amend on payment of costs; otherwise judgment for plaintiff.

Ex Parte THE BANK OF AUSTRALASIA.
In re THE REGISTRAR-GENERAL AND THE MASTER OF TITLES.

[In Banco]. 1865. *1st, 3rd, 6th Feb.*

Cockle, C. J. Lutwyche, J.

28 Vic., No. 13, ss. 38, 43—3 Vic., No. 18, s. 1—25 Vic., No. 14, ss. 91—Fi. fa.—Conveyance by sheriff—Direction to levy on goods and chattels only—Registrar-General, Duty of.

A writ directing the Sheriff to levy upon goods and chattels does not authorise him, in virtue of section 38 of 25 Vic., No. 13, to levy upon lands. A levy and sale by the Sheriff is not of the less effect, by reason only of its having taken place before a memorial of the writ was, under section 91 of 25 Vic., No. 14, entered on the register book.

It is not the duty of the Registrar-General to register the Sheriff's conveyance, but the Sheriff's vendee must bring his ejectment.

CASE stated for the opinion of the Court, under an order of Cockle, C. J., dated the eighteenth day of January, 1865, made pursuant to the 14th section of the *Real Property Act of 1861.*

Ex parte THE BANK OF AUSTRALASIA. *In re* THE REGISTRAR GENERAL AND THE MASTER OF TITLES.

Cockle, C.J. Lutwyche, J.

The case stated was as follows:—

By the 91st section of the *Real Property Act of 1861*, it is enacted—"No judgment already entered up or to be hereinafter "entered up nor any writ of execution issued in pursuance of any "such judgment notwithstanding any purchaser mortgagee or creditor "may have had actual or constructive notice thereof shall bind or "affect or be effectual against any land under the provisions of this "Act or any estate or interest therein as to purchasers mortgagees or "creditors unless and until a memorial of the said judgment or writ as "the case may be shall have been entered in the register book and "also upon the instrument evidencing title to the estate or interest "intended to be charged or taken in execution in case such instrument "shall be produced to the Registrar-General and upon proof to his "satisfaction that any such judgment or writ of execution has been "discharged or satisfied the Registrar-General may enter in the "register book and on the certificate of title or other instrument "evidencing title to the estate or interest charged or affected a "memorandum to that effect and upon such entry being made the "judgment or writ of execution to which such entry relates shall be "deemed to be discharged or satisfied. Provided always that no writ "of execution although duly entered in the register book as aforesaid "shall affect any land under the provisions of this Act or any estate "or interest therein as to purchasers mortgagees or creditors unless "such writ be executed and put in force within three calendar months "from the date of the entering such writ."

On the 13th day of January, 1865, an office copy of a writ of *fieri facias*, dated the 24th day of September, 1864, was lodged with the Registrar-General in order that a memorial of the said writ might be entered in the register book, as was accordingly done.

The said writ was issued upon a judgment recovered by Charles Lamonnerie dit Fattorini and Eugene Lamonnerie dit Fattorini, in an action against John Hardie and Arthur Wienholt, and by the said writ the Sheriff was commanded to cause to be made of the goods and chattels of John Hardie and Arthur Wienholt, therein described, the sum of six hundred and fifty-eight pounds, fifteen shillings and four-pence.

On the same 13th day of January, after the entry of a memorial of the said writ in the register book, a memorandum of conveyance, correct in point of form, was presented to the Registrar-General for registration, whereby, after reciting the said writ of *fieri facias* and

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Cockle, C.J. Lutwyche, J.

that he had by virtue thereof made a levy upon and had sold the lands therein mentioned, the Sheriff bargained, sold, and assigned to the corporation of the Bank of Australasia certain lands therein described, and whereof the said John Hardie and Arthur Wienholt are registered proprietors, together with all the right, title, and interest, of the said John Hardie and Arthur Wienholt therein and thereto.

If the said memorandum of conveyance is sufficient in law, it is the duty of the Registrar-General to register it, and thereafter to issue to the corporation of the Bank of Australasia certificates of title for the several parcels of land therein mentioned; but he has refused to register the said memorandum of conveyance, because he is advised, (1.) that the said writ of *fieri facias* was insufficient to support the sale, inasmuch as it did not command the Sheriff to make a levy on the lands of the defendants; (2.) that the levy and sale were bad in law, because (as appears from the recitals of the said memorandum of conveyance), the said levy and sale were made before any memorial of the said writ had been entered in the register book; (3.) that the *Real Property Act of 1861* does not authorise the Registrar-General to register the transfer of land under the provisions of the said Act, if purporting to be made by the Sheriff in pursuance of a writ of *fieri facias*.

The opinion of the Court is therefore sought upon the following questions of law:—

1. Was the said writ sufficient to authorise a levy and sale of the defendants' lands?

2. Was the said levy and sale of any effect, having taken place before a memorial of the said writ was entered on the register book?

3. Is it the duty of the Registrar to register memoranda of conveyance executed by the Sheriff, in pursuance of a sale under a writ of *fieri facias*?

Bramston, as Master of Titles, and for the Registrar of Titles.

Pring, A. G., for the Bank of Australasia.

C. A. V.

February 6th 1865.

The judgment of the Court was delivered by LUTWYCHE, J., as follows:—

1. The case of *Walker v. Riches*, cited in the margin of "Execution" (c.), 1., of Bacon's Abridgement (page 376 of the 7th edition), was relied on by Mr. Bramston, while the Attorney-General rested his argument on 25 Vic., No. 13, sec. 38 *et seq.* The

obvious applicability of the word "seize" in section 38, to goods and chattels, and the use of the word "seizure" in section 41, undoubtedly seem to show that "seize" in section 48 applies to "lands," and that (despite the occurrence of the phrase "any money" in 3 Vic., No. 18, sec. 1) the words "levy any sum of money" may be read connectedly. But, reading sections 37 to 43 in connection one with the others, we think that the Sheriff's authority to seize lands only exists provided that he be so commanded by the writ. Otherwise, in virtue of section 43, he might, under a writ of *fieri facias* issued in conformity with section 37, seize property of an absconding debtor other than the "said goods and chattels" to which the operation of the last-named section appears to be confined. The form of writ in the Schedule to the Rules of May 26, 1863, is subject to such alterations as "the circumstances of the case may render necessary," and those circumstances may render necessary the use of such a form of *fieri facias* as that given in the Rules of Court (Equity, page 42, Schedule F., No. 1), which moreover (Order XXVIII., Rule 6, *et seq.*) prescribe a mode of procedure to the Sheriff. As the first question stands, we, conforming, as we conceive, alike with principle and the words of the Act, answer it in the negative. We pronounce no opinion upon the separate or combined effect of the entry of the memorial in the register book, and of any amendment which our powers in that behalf (greater than any exercised in the days when *Walker v. Riches* was decided) may on a proper occasion, and as between the proper parties, enable us to make.

2. We think that the said levy and sale was not of the less effect by reason only of its having taken place before a memorial of the said writ was entered on the register book.

3. The enactment of section 42, that the Sheriff's deed of sale shall be *primâ facie* evidence (not before the Registrar-General, for the *Real Property Act* did not come into operation until some months after the enactment in question), seems to indicate that if the defendant or other occupier of his lands does not yield up possession, the Sheriff's vendee must bring ejectment, and so afford the defendant an opportunity of impeaching the judgment for fraud, irregularity, or other legal ground of avoidance, and this view is borne out by *Rex. v. Deane*, as cited from 2 Shower, 88, in *Taylor v. Cole*, (3 T.R., 292), to which last case there is an erroneous reference in the margin of Bacon's Abridgement, p. 388, of the edition before mentioned.

As the third question stands, we answer it in the negative, pronouncing no opinion upon the effect of a yielding up of the possession

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by the defendant or other occupier of his lands to the Sheriff or his vendee.

This opinion has been drawn up in reference to the case originally submitted to us. We have had no proper opportunity of hearing the case, as since amended, argued by counsel, and we therefore direct that the amended case be re-argued.

Ex Parte LOUIS LE GOULD. *In re* THE REGISTRAR-GENERAL AND THE MASTER OF TITLES.

[IN BANCO]. 1864. *26th November.*

Cockle, C.J. Lutwyche, J.

25 Vic., No. 14, s. 119, 120—Road—Public highway—Subdivision of land—Special case.

A road leading from a public highway into a place where there is no thoroughfare is not necessarily a public road.

Where a special case is stated the matter should be argued by counsel on both sides.

SPECIAL CASE submitted by the Master of Titles under the 14th section of the *Real Property Act of 1861*, with reference to Allotment No. 84, parish of Toombul, County of Stanley, for the opinion of their honors the Chief Justice and Judge of the Supreme Court of Queensland.

The case set out the following facts:—

That the said allotment, No. 84, was originally granted to Frances Spencer Cameron, of Brisbane, by Deed of Grant, under the hand of Sir George F. Bowen, Governor of the Colony of Queensland, and under the Seal of the said Colony, dated the 10th day of May, 1862.

That the said piece of land was subsequently conveyed by instrument of "nomination of trustees" bearing date the 13th day of

November, 1862, by the said Frances S. Cameron, to James Francis Garrick, of Brisbane, as trustee for Eliza Binney, the wife of Edwin Binney, of Brisbane, to convey the same to such person or persons for such estates, ends, intents, and purposes, as Eliza Binney, of Brisbane, the wife of Edwin Binney, should by any document appoint, and in default of, and until such appointment, and so far as the same should not extend, and subject thereto in trust for the sole and separate use of Eliza Binney, her heirs and assigns for ever.

That the said land was thereafter subdivided in the manner shown by the plan annexed hereto, called the original subdivision, and marked A.

That the plan of the said subdivision was duly recorded in the office of the Registrar-General of the Colony of Queensland.

That lots 6, 7, 8, and 9, of said subdivision of portion 84, as shown on the said plan marked A, *Vide* plan, p. 134, were purchased by, and conveyed to Louis Le Gould, of Brisbane, licensed surveyor, and a certificate of title for the land comprised in said lots 6, 7, 8, and 9 was issued in favor of the said Louis Le Gould by the said Registrar-General.

That the said Louis Le Gould subsequently purchased the remaining part of the said portion 84, including the roadway, and a conveyance of same was duly executed and lodged in the office of the Registrar-General; and the said Louis Le Gould has requested the said Registrar-General either to issue a certificate of title in his favor for the land colored pink on said plan marked A, including the roadway through the centre thereof, or to cancel the certificate of title originally issued for lots 6, 7, 8, and 9 of said subdivision, and issue a certificate in his favor for the whole of said lot 84.

That the said Louis Le Gould has since surveyed and laid out the said piece of land according to the plan marked B, by which subdivision two roads are opened from the government road on the south, to portion 80 on the north; and the said Louis Le Gould has sold several of the lots marked thereon to different persons.

That the Registrar-General and Master of Titles are doubtful, having regard to the provisions of the 119th and 120th sections of the *Real Property Act of 1861*, as to whether they could comply with either of the requests of the said Louis Le Gould, as thereby the said road in subdivision marked A would be closed.

The opinion of this Honorable Court is, therefore, respectfully requested as to whether, under the circumstances above set out, the

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Cockle, C.J. Lutwyche, J.

Registrar-General would be justified in law in—(1.) Either cancelling the certificate of title issued by him for lots 6, 7, 8, and 9, of the said original subdivision, and also the plan of same, and issuing in favor of the said Louis Le Gould, a certificate of title for the whole portion No. 84; or in (2.) Issuing in favor of the said Louis Le Gould a certificate of title for the land shown on the plan marked A, colored pink, including the said road or right of way, and also cancelling the said plan of said subdivision marked A.

Bramston applied for the opinion of the Court upon the above case.

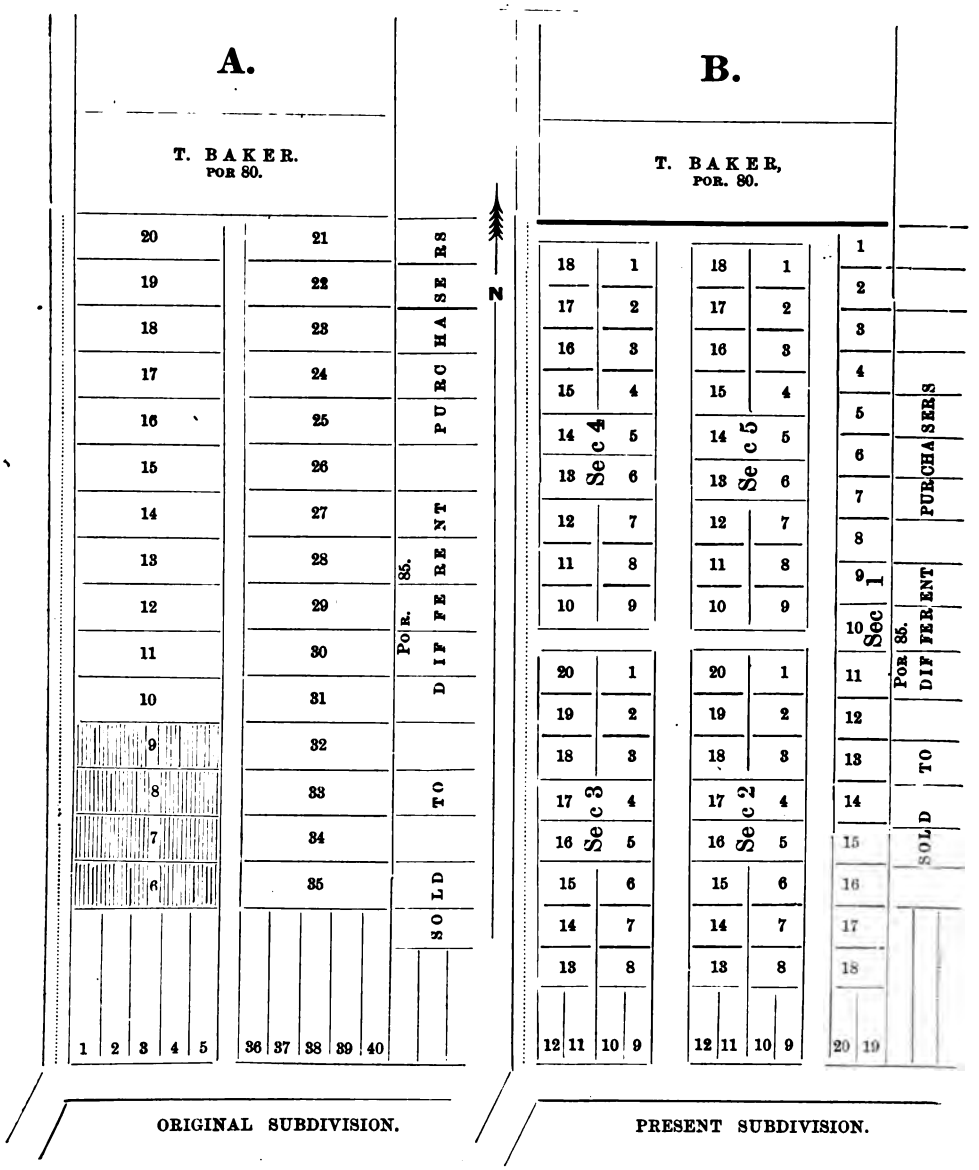
THE COURT said that they felt placed in a position of some difficulty, in consequence of the non-employment of counsel by the person chiefly interested in the result. It was not to be expected that the Master of Titles would be astute to discover grounds for disturbing his own foregone conclusions. The collision of two intellects, each brought to bear upon a given subject from a different point of view, was of the greatest value to the Court in assisting them to form their judgment, and they expressed a hope, that in future, special cases under the *Real Property Act* would be argued by counsel on both sides. Looking, however, at the road, as delineated in the original subdivision of portion 84, they were of opinion that it was not necessarily a public road. There could be no doubt that there might be a public highway over a place where there was no thoroughfare (*Bateman v. Bluck*, 18 Q.B., 870), but the existence of the highway was a question of fact, and nothing could be gathered, either from the special case or the map, to show an user by, or a dedication to, the public of the road in question. They thought that *Woodyer v. Hadden* (5 Taunt. 126) was not materially distinguishable from the present case. The plaintiff in *Woodyer v. Hadden* had erected a street, leading out of a highway, across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street for twenty-one years by the defendant's fence; and it was held, by three Judges against one, that this street was not so dedicated to the public that the defendant might pull down his fence, and use the street as a highway. The Court agreed with Mr. Justice Chambre (the dissentient Judge in *Woodyer v. Hadden*) that an unequivocal act of dedication, such as building a double row of houses opening into an ancient street at each end, and selling or letting the houses, would

instantly make the passage between the houses a highway, as would be the case if the proposed subdivision (B) of portion 84 were accepted; and they hoped that this intimation of their opinion would be sufficient for the guidance of the Registrar-General. (b)

(b) See also *Pipe v. Fulcher* (November 15, 1858), reported 28 L.J., Q.B., 12. There, in order to prove that there was a public right of way over and along certain closes which were part of a manor, the defendant put in evidence a map which had been used by a deceased steward of the manor at the manor courts. In it there appeared a space marked out by two lines crossing the closes in question, and called Mellow Lane. There was nothing on the face of the map to show whether Mellow Lane was a public highway or merely an occupation road. *Held*, that the map was inadmissible in evidence.

PLAN OF SUBDIVISION OF PORTION NO. 84, PARISH OF TOOMBUL, COUNTY STANLEY.

Scale—4 chains to 1 inch.



R. v. NUGENT.

Larceny—Absolute and special property—Felonious intent.

[IN BANCO]. 1865. *19th April.*

Cockle, C.J. Lutwyche, J.

N. was charged with stealing and receiving two kegs of brandy, seized by K, a sergeant of the police, in the execution of his duty. The jury found as a fact that N. intended to deprive K. of his whole property in the goods, but had taken them for the benefit of the former owner.

Held, that on those facts a conviction of larceny could not be sustained.

R. v. Knight (2 East. P. C. 510), followed.

CROWN CASE reserved by Cockle, C. J., on the trial of Nugent at Rockhampton, on an information containing two counts, charging him with stealing and receiving two kegs of brandy which a sergeant in the gold escort of police had seized in the execution of his duty, and which, subject to such seizure and its results, were the property of Smith.

In answer to questions put by the learned Judge, the jury found the prisoner intended to deprive Kelly of his whole property in the goods, and that he took them for the benefit of Smith, being aware of a lawful seizure by Kelly, and that the latter had a right to the goods as against Smith.

The prisoner was convicted on both counts and sentenced.

The question reserved for the Court was whether, on the facts so found, a larceny had been committed.

Pring, A. G., for the Crown, cited *R. v. Privett* (1 Den. 193) *R. v. Jones* (Ib. 188).

COCKLE, C. J. In *R. v. Knight* (2 East. P. C. 510), where uncustomed goods were seized by the prisoners with intent to re-take them on behalf of their former owner, the presumption of the felonious intention was rebutted on the finding of the jury. In *R. v. Privett* there was an absolute ownership. In *R. v. Knight* the property was special. The two cases are distinguishable from the one now before the Court, in which there was no absolute property. We follow *R. v. Knight*, and avoid the judgment.

Conviction quashed.

Re WARRY'S WILL, *Ex parte* WARRY.

[IN BANCO]. 1865. *23rd March. 6th September.*

Cockle, C. J. Lutwyche, J.

Will—Real Property Act of 1861 (25 Vic. No. 14), s.s. 14, 42, 86, 89, 123, 126—Application to bring land under the Act.—Property passing under Will or to heir—Master of Titles.

A testator, seised of lands in fee simple by his will, bequeathed to his wife "the whole of my worldly goods and possessions," and appointed executors.

Quære whether the bequest passed the fee simple of estates realty.

The Court will only recognise the Master of Titles when he appears *qua* Master of Titles, or on behalf of the Registrar of Titles.

SPECIAL CASE, under s. 14 of *The Real Property Act of 1861*, submitted for the opinion of the Court.

The case stated was as follows:—

Charles Samways Warry, siezed in fee simple of lands in the colony of Queensland, on the 17th December, 1863, made his Will in the following terms:—

"This is my last Will and Testament. I bequeath to my wife, "Mary Theresa Warry, the whole of my worldly goods "and possessions, and I leave and appoint C. E. Jackes, "and Thomas Symes Warry my Executors."

The Testator died on the 23rd of December, leaving his widow *enceinte*; a posthumous son was born, and is the heir-at-law. The Executors proved the Will in the Supreme Court, in March, 1864. The widow has applied to bring parts of her late husband's lands under *The Real Property Act* in her own name, but the Registrar-General is advised not to issue a certificate without obtaining the opinion of the Supreme Court upon the effect of the Will above set out.

The opinion of the Court is, therefore, sought upon the following question of law:—

"Does the fee simple of the land of the late Charles Samways "Warry pass to his widow by virtue of the Will set out in the above "case?"

Pring, A. G., for widow, cited *Whicker v. Hume*, (14 Beav., 509.)

Bramston, Master of Titles, cited *Davenport v. Coltman* (9 M. & W., 481., 12 Sim., 588).

C. A. V.

September 6th, 1865.

Re WARRY'S WILL, *Ex parte* WARRY.

Cockle, C. J.
Lutwyche, J.

The judgment of the Court* was delivered by the CHIEF JUSTICE, and was as follows:—

We are unable to say that the fee simple of the land passed to the widow by virtue of the will. There are persons not bound by the probate, who are not properly represented here, as the alleged devisee is.

It has been strongly and repeatedly urged that the devisee is anxious to make a transfer. Such arguments ought not to induce us to give currency to titles, of the validity of which the Court cannot, in the absence of evidence and of the necessary parties, deem itself duly satisfied. They ought rather to suggest the complications which, under sections 123 and 126, may arise from the claims of a purchaser. An opinion formed upon imperfect materials, even if now expressed, would not be binding upon the Court in any future litigation, and, if it should prove erroneous, would not only be prejudicial to the devisee (section 126), but might also, in virtue of sections 42 and 127, affect the assurance fund and, ultimately, the general revenues of the colony.

There is a notable difference between the provisions of section 85 and those of the following three sections. The rights of the devisee, and the mode of their exercise, under section 89, were not adverted to in the argument.

* COCKLE, C. J., and LUTWYCHE, J. At the time of argument it was stated by Mr. Bramston that he appeared, virtually, for the infant. The Court, however, were of opinion that they could only recognise him as appearing, either on his own behalf, as Master of Titles, or on behalf of the Registrar-General.

R. *v.* LEWIS.

[IN BANCO]. 1865. *7th December.*

Cockle, C. J. Lutwyche, J.

Crown case reserved—Crown prosecutor—Right of reply—District Court.

The Crown Prosecutor in the Supreme Court has a right to reply, even though the prisoner call no evidence.

Quære whether the same rights exist under *The District Courts Act.*

Crown case reserved by LUTWYCHE, J.

The prisoner was tried at the Criminal Sittings of the Supreme Court at Rockhampton, on the 30th September, 1865, before his Honor Mr. Justice Lutwyche, on a charge of horse stealing. No evidence was called for the defence. *Bramston*, Crown Prosecutor, claimed a right to reply on the part of the Crown. The learned Judge allowed the reply, but reserved, for the consideration of the Full Court, the point whether he was right in allowing such reply. The prisoner was convicted, and sentenced to one year's imprisonment with hard labour.

Lilley, A. G., in support of the right, referred to 7 C. & P., 676, where it was stated that, at a meeting of the Judges, a discussion took place as to certain points likely to occur at the assizes, in consequence of the recent Act allowing prisoners indicted for felony to make full defence by counsel. The course of practice as to the right of reply by the Crown which it was thought most advisable to adopt, was as follows:—In cases of public prosecution for felony, instituted by the Crown, the law officers of the Crown, and those who represent them, are, in strictness, entitled to the reply, although no evidence is produced on the part of the prisoner.

THE COURT were of opinion that Mr. Bramston, being duly authorised to represent the Attorney-General, had the same right as the Attorney-General; but that it must be understood that they gave no opinion as to whether the same rights extended to Crown Prosecutors under *The District Courts Act.*

In re OWEN.

Barrister of New South Wales—Admission of, for purpose of appearing in particular case—Residence—Intention of practising.

1865.
7th, 8th Dec.

Cockle, C. J.
Lutwyche, J.

A barrister of another colony will not be admitted for the purpose of appearing in a single case; an affidavit of residence in, or intention of practising in Queensland is necessary.

MOTION for admission of W. Owen as a barrister of the Supreme Court of Queensland.

Lilley, A. G. I move that Mr. Owen be admitted as a barrister of this Honourable Court.

COCKLE, C. J. We do not intend to take any motions to-day, and it can make no difference to Mr. Owen if he is admitted to-morrow.

Bramston. It will make a great difference to Mr. Owen, as he has come to Brisbane on a special case that is to be argued to-day, and, of course, if he is not admitted he cannot appear.

Pring. I oppose the admission of Mr. Owen on principle—not because he is Mr. Owen, or in a personal manner, but because I think it is against all precedent, and unfair to the Queensland bar.

Lilley, A. G. I merely make this motion as a matter of courtesy, and I will ask the Court if it will hear Mr. Owen personally.

COCKLE, C. J. We are quite willing to do so.

Owen. As an English barrister, I have a degree which a colonial barrister has not, and an English barrister ought to be admitted on that alone.

LUTWYCHE, J. But there is this difference between them, that a Queensland barrister has to pass an examination which an English one is not bound to do unless he chooses.

Owen. True, but a Queensland barrister can be admitted on a crammed examination in three months, whereas an English barrister, if he does not elect to pass an examination, must attend lectures for three years without missing one; so that an English barrister is bound to know something of law, whereas a colonial one, after a few months' reading or examining, can possibly know very little.

C. A. V.

In re OWEN.

Cockle, C J.
Lutwyche, J.

8th December, 1865.

COCKLE, C. J. With respect to the application made yesterday by the Attorney-General for the admission of Mr. W. Owen, a barrister of New South Wales, to practise at this bar, the Court is at all times ready to admit all barristers of any of the recognised bars of England, Ireland, Victoria, or New South Wales, for the purpose of practising at the Queensland bar; but we do not think that an application for admission, like the present, which appears to be for the purpose of the conduct of a single case, can be entertained.

LUTWYCHE, J. I concur with the judgment of the Chief Justice. An affidavit of residence or intention to practise is necessary to ground an application for admission to the bar of this colony. If Mr. Owen should ever decide upon becoming a resident practising barrister in Queensland, this Court will give him a hearty welcome; but, at present, the application must be refused.

KEITH *v.* BUTLER & FOSTER.

1866.
4th May.
Lutwyche, J.

Garnishee—Equitable assignment of debt before judgment—Prospective debts—Power of Attorney—Power to assign.

An equitable assignment of money before a judgment is sufficient to bar a subsequent garnishment. Prospective debts may be assigned.

Ryall v. Rowles, 1 Ves., 348, followed.

SUMMONS by William Keith, judgment creditor, calling on Webb Brothers to show cause why they should not pay to Keith the debts due by them to Thomas Butler and William Foster, judgment creditors.

Butler & Foster were contractors for the erection of a store for Webb Brothers in Brisbane, and from time to time, as moneys became due on the contract, they were paid over to Robert A. Gibson, Manager of the Commercial Bank of Sydney, in compliance with a letter dated 13th October, 1865, and signed by Joseph Holden, attorney for Butler & Foster, in which it was requested that Webb Brothers should pay any money due, or to become due in respect of the contract, to the Commercial Bank in Brisbane; and after various sums had been paid, there was owing £128 1s. 6d., for which a demand was made upon Webb Brothers, on behalf of the Commercial Bank. Judgment was signed on 29th March, 1866, by Keith against Butler & Foster.

Lilley, A. G., for the garnishees, contended that before judgment there had been an equitable assignment of the debt to the Bank, and cited *Ryall v. Rowles* (1 Ves., 348.)

Pring, for the judgment creditor, objected that the power of attorney did not give Holden the power to execute mortgages, and that the order was given by way of mortgage; also that the assignment of prospective debts was not sufficient against the judgment creditor. It might be good between the parties to the agreement, but not as between third parties, such as judgment creditors.

C. A. V.

KEITH
v.
BUTLER & FOSTER

Lutwyche, J.

4th May.

LUTWYCHE, J. It appears in this case that William Keith, who has recovered judgment against Butler & Foster, has obtained a summons, calling upon Webb Brothers to show cause why they should not pay to him, as judgment creditor, certain moneys in their hands. Their answer is that all the moneys due, or to become due in respect of the contract spoken of in the affidavits, were equitably assigned to the Commercial Bank. Two objections were raised by Mr. Pring: the first being that the power of attorney was defective, as the order was given by way of mortgage, and the power of attorney contained no clause enabling Holden to mortgage or assign the debt. But, on looking over the power of attorney, it appears that there was a clause authorising him to sign, accept, or indorse any cheque, promissory note or notes, bill or bills of exchange, and return or renew the same, with further authority with reference to promissory notes. In the present case, it appears that the order was given to Mr. Gibson to secure the Bank upon the discounting of promissory notes discounted by the Bank to enable Butler & Foster to carry on the contracts. I am, therefore, of opinion that the power of attorney was sufficient. As to the second question, whether an assignment is sufficient to stop the judgment creditor at law, Mr. Pring advanced no authority, nor have I been able to find any. With regard to the question whether the assignment of prospective debts, debts not only due, but to become due, is sufficient in law, I have no doubt that it is, upon the authority of *Ryall v. Rowles* (2 White and Tudor, 615), and the cases there cited.

The summons is dismissed. There will be no order as to costs.

Solicitor for judgment creditor: *Doyle.*

RICHARDS *v.* WATT.

1866.
4th, 13th July.
Cockle, C.J.

Costs—Taxation of—Charge by Queensland solicitor in a sum in gross for work done by N.S.W. solicitor—Disallowance of charge where no necessity appearing for employment of N.S.W. solicitor.

Where in a bill of costs a sum in gross was charged for services rendered by a New South Wales solicitor, and no evidence was advanced as to the necessity of the employment of a solicitor outside the colony of Queensland, although there was evidence that for the work actually done the charges were reasonable.

Held, that the charge must be disallowed.

MOTION to review taxation of Registrar of defendant's costs on a successful motion for the dissolution of an injunction.

Lilley, *A.G.*, for the plaintiff.

Bramston, for the defendant.

The facts appear sufficiently in the judgment of the learned Judge.

C. A. V.

13th July, 1866.

COCKLE, C.J. During this suit an injunction was dissolved with costs, and the bill was afterwards, and by consent, dismissed with costs. The present questions arise upon the taxation of the costs of the dissolved injunction. The bill of those costs comprised the several items of the charges of the defendant's Queensland solicitors, and a concluding item by which a sum in gross was claimed in respect of the charges of their New South Wales solicitors, rendered to the defendants, the amount of which formed the last item in the bill of costs submitted to the Registrar by the Queensland solicitors. To the annexed bill was attached an affidavit, stating, amongst other things, that the New South Wales firm were instructed by the defendants to take the necessary legal measures in New South Wales to move to dissolve the injunction and to protect their interests generally in the suit, and that such measures as were deemed to be necessary were taken by the firm on behalf of the defendants for their defence in the suit, and that, amongst other things, the firm, for that purpose,

Richards v. Watt. Cockle, C.J.

retained and employed the Queensland solicitors to act as solicitors for the defendants in Queensland. In the affidavit it is further stated that the whole of the business mentioned in a certain document was necessarily transacted in New South Wales, and that the charges contained in the said document, as made for the same, are the proper and ordinary charges allowable in New South Wales for such business; and that the New South Wales firm has charged the defendants with the amount thereof, and that all the fees and sums charged as having been paid have been paid by the said firm. This document, although lettered C and not A, and not marked as an annexure, I take to be the New South Wales bill of costs, which the Registrar refused to go into, disallowing the last item of the Queensland bill. In an affidavit in support of this motion a member of the Queensland firm states that, by such disallowance, a quantity of work, labor, and attendance, which were necessary to be done, performed, and made on behalf of the defendants in the colony of New South Wales, and which, if the same had not been done, performed, and made there, would necessarily have been done, performed and made by the solicitors herein for the defendants in this colony, and would have been, in his opinion and belief, properly allowable to the defendants on taxation, have been wholly disallowed to the defendants. It does not appear from the Queensland affidavit that there was any necessity for transacting any of the business in New South Wales, and if there be a seeming discordance between the two affidavits, it may arise from the deponent in the New South Wales affidavit not sufficiently distinguishing that which was absolutely necessary from that which may have been highly convenient to the defendants personally. I think that the learned Registrar rightly considered that the only solicitors whose claims he could recognise as chargeable on the plaintiffs, were the solicitors on the record: that he rightly refused to go into the account of the Sydney solicitors, or to give any opinion as to the reasonableness or otherwise of its charges, and that he properly disallowed the last item of the Queensland bill of costs.

I also approve of the Registrar having disallowed from the Queensland bill of costs certain charges consequent on the employment of the Sydney solicitors, and for all correspondence between the two firms, and for a counsel's fee previously disallowed by order of the Court, and for casual attendances on counsel, and for all charges in respect of a second counsel, there being no second counsel—at all events, none belonging to the Queens-

land bar. Two items are disallowed as being an untenable charge, on the ground that it was for perusal of the defendants' own affidavits. If it had been contended on sufficient reasons that the preparation of the affidavits in New South Wales, or elsewhere, prevented a delay, vexation, or expense, which would have outweighed the advantages of the preparation of the affidavits by the solicitors of this Court, and if other demands than for perusal had not been made in respect of the same affidavits, and if one of these items, small in amount, had been more clearly free from excess or redundancy in character, and if the bill of costs had not been so framed as to give colour to a conjecture that possibly its framers contemplated the defendants, and the two firms as standing in the ordinary relations of solicitor, agent, and client, the defendants might have been in a better position for contesting this sort of taxation.

Again, looking at the allowed items immediately preceding and following the two relating to the office copy of the certificate, I shall not disturb the taxation thereon. Two items are disallowed as being included in a former charge for fair copy. These last disallowances require review. In other respects the taxation seems unobjectionable. The defendants must pay the costs of this motion.

REGINA *v.* ATTWOOD.

[IN BANCO.] 1866.
5th September.

Cockle, C. J.
Lutwyche, J.

Information — Counts for felony and misdemeanour — Amendment refused—Plea.

An information contained a count for felony, with a count for a misdemeanour. Leave to amend was refused. The accused pleaded, and no evidence was offered on the felony, and the prisoner was convicted of the misdemeanour.

***Held*, that the conviction as to the misdemeanour must be sustained.**

***R. v. Ferguson* (27 L.J., M.C. 61) followed.**

CROWN CASE reserved by the Judge of the Metropolitan District Court, at Brisbane.

The prisoner was tried, on the 14th August, on an information charging him with obtaining goods under false pretences, by uttering a forged cheque; and also with feloniously stealing the said goods. At the trial, objection was taken to the indictment, and leave to amend, by striking out the count for the felony, was refused. The prisoner pleaded, and a verdict of guilty was found on the first count, and sentence passed, the learned Judge reserving, however, the question whether the conviction could, under the circumstances, be sustained.

The prisoner in person.

COCKLE, C. J., delivered the judgment of the Court as follows:—

The occasions for amendments should be few, and should only arise under circumstances which could not have been foreseen by the draftsman if he had used reasonable foresight. It seems that the learned Judge refused to exercise those powers of amendment which, if they have the effect of leading to looseness of criminal pleadings, and are made the means of casting on the Judge the duty of the clerk of indictments, will prove of questionable public utility, and will probably lead to evils as great, at least, as those they were intended to obviate. The information, combining as it did, a count for felony with a count for misdemeanour, was improperly framed; but we are not called upon to discuss the mode of rectifying the irregularity: we have only to consider the information as tried, and, in so doing, we presume that the prosecutor elected, or was put to his election, and that the prisoner was not embarrassed in his defence. He made, as it seems, no application to quash the information, but pleaded to it;

and no evidence was offered on the count of felony. Under these circumstances we think the conviction must be sustained, and we are supported in this view by the analogous case (the converse of the present) of *R. v. Ferguson* (24 L. J. M. C. 61, Dears. C. C. 427), and we affirm the conviction accordingly.

REGINA *v.* HENNESSY.

[IN BANCO]. 1866. *5th September.*

Cockle, C.J. Lutwyche, J.

Crown Prosecutor—District Court—Right of reply where prisoner calls no evidence.

No counsel, excepting the Attorney-General, on behalf of the Crown, or a counsel representing the Attorney-General and so acting, can reply, as of right, on the defence of a prisoner who adduces no evidence.

CROWN CASE reserved by Sheppard, D.C.J.

The prisoners were tried in the District Court at Brisbane, on 13th June, 1866, on an information preferred by the Crown Prosecutor for the Metropolitan District, on a charge of horse stealing. No witnesses were called or examined for the prisoners, but on the conclusion of the case for the Crown, their advocate addressed the jury. At the close of his address, the Crown Prosecutor claimed a reply, which was objected to by the prisoners' advocate, no witnesses having been examined for the defence. The right having been insisted upon, the learned Judge allowed it; but, on the application of the prisoners' advocate, reserved the question for the consideration of the Supreme Court. The prisoners were convicted, and each sentenced to two years' imprisonment with hard labour.

Gore Jones, for the Crown.

Murphy, for the prisoners.

COCKLE, C. J. No counsel, excepting the Attorney-General, on behalf of the Crown, or a counsel representing the Attorney-General and so acting, can reply as of right, on the defence of a prisoner who adduces no evidence. This is a rule of law regulating practice, and

REGINA v. HENNESSY.

Cockle, C.J. Lutwyche, J.

not a mere matter of practice depending on the arbitrary discretion of judges. Whether the rule be inflexible is a point we need not enter upon, for the case suggests no special circumstance occasioning a departure from the general rule. The case does not state, and we cannot presume that the District Court Crown Prosecutor represented or ever assumed to represent, the Attorney-General. It would, perhaps, have been better if the commission under which the Crown Prosecutor had acted had been set out, but we do not think it necessary to send the case back to be re-stated; for having been furnished by direction of the Attorney-General with copies of the commission, certified by our Registrar's clerk, we cannot see that its contents would lead to any substantial modification of the case. It may be presumed, then, upon the case as stated, that the right of the District Prosecutor to reply on the defence of prisoners on whose behalf no witnesses were examined, arose as a question of law on their trial. It may further be presumed that this right, which was insisted upon, was held to inhere in him simply as Crown Prosecutor, and in virtue of his office only. On these presumptions, which arise upon the case as stated, we think that the decision was wrong; and, being of opinion that a question of law which arose on the trial was wrongly decided, we avoid the conviction, and order all necessary and proper entries to be made accordingly.

LUTWYCHE, J. The practice of the Court is the law of the Court, and very great injustice might be occasioned by a departure on the part of the judge from long established usage. For instance, he might refuse the prisoner permission to cross-examine the witnesses for the Crown, or deny him the privilege conferred upon him by statute of being heard in his defence by counsel. These well-known legal rights would be taken away from him, yet no record of it could be preserved, and unless we had the power of determining such questions of law, the prisoner could have no remedy.

Re WHITE, *Ex parte* GOGGS.

1866.
5th December.

Lutwyche, J.

Mortgage—Insolvency of Mortgagor—Sale by mortgagee—Purchase by Agent—Constructive fraud—Proof of debt—28 Vic., No. 25, ss. 100, 175.

W. granted a mortgage of certain land to G. with a power of sale in case of default. W. subsequently executed a deed of assignment for the benefit of all his creditors. The mortgaged property was sold by G. and realised less than the sum advanced, the purchaser being a clerk in the employ of G.'s solicitors. G. sought to prove in the estate for the unsecured balance.

Held, that the purchase was colourable, being made on behalf of G., and the claim was disallowed.

A mortgagee with power of sale is a trustee, and cannot, without the express consent of his *cestui que* trust, purchase an estate of which he is the mortgagee.

ORDER *nisi* calling on Robert Bulcock and Simon Fraser, trustees of the assigned estate of Godfrey Freeman White, to shew cause why the sum of £258 12s. 3d. should not be paid to Matthew Buscall Goggs, and why they should not pay the costs of the application.

The facts and arguments appear in the judgment.

Harding, for the trustees, shewed cause.

Lilley, *A.G.*, *Pring* with him, moved the rule absolute.

LUTWYCHE, J., delivered the following judgment:—

In this case, which was argued with great ability on both sides, on the first day of the present term, an order had been obtained calling upon Robert Bulcock and Simon Fraser, trustees of the assigned estate of Godfrey Freeman White, to show cause why the sum of £158 12s. 3d., or such other sum as the Court should direct, should not be paid by the said trustees to Matthew Buscall Goggs, and why they should not also pay the costs of the application. The application was made to me, sitting as Judge in Insolvency, under the 100th and 175th sections of the *Insolvency Act of 1864*, their combined operation giving the Court authority to determine any question which may arise out of any claim, dispute, or difference between the Official Assignee, the Creditor's Assignee, and the creditors of any person adjudged insolvent, or between a debtor and his creditors and the trustees of any registered trust deed executed for the benefit of

Re WHITE. *Ex parte* GOGGS.

Lutwyche, J.

creditors. Several points of law were discussed during the argument, but it is not necessary to advert to more than two of them, and the facts which apply to these may be briefly stated. By a mortgage dated 7th April, 1865, and a further charge dated 7th October, in the same year, certain freehold property, situate in Brisbane, was conveyed by White to the applicant, Matthew Buscall Goggs, to secure the re-payment of £600 and interest, with a power of sale to the mortgagee in case of default in payment of either principal or interest. On 9th April, 1866, White executed an assignment of all his property for the benefit of his creditors, and the deed was registered on 5th May last. At this time, interest on the mortgage money was in arrear, and Goggs was asked, through his attorneys, Messrs. Roberts and Hart, to become a party to the trust deed, but he refused to do so; and, acting upon his power of sale, he caused the mortgaged premises to be put up for sale by public auction on the 14th May, and they were sold for about £400 to the only bidder, John George Brown, a clerk of Messrs. Roberts and Hart, and who was, as such clerk, conducting the sale. The 10th paragraph of the joint affidavit of Messrs. Fraser and Bulcock distinctly states this fact, and the statement has not been contradicted. I pause here to dispose of one of the two points to which alone reference need be made. As Mr. Harding argued, it is clear law, resting upon authority which cannot now be shaken, that an agent employed by a trustee for sale—as a mortgagee with power of sale in fact is—cannot purchase for himself. (*Downes v. Grazebrook*, 3. Mer. 200; *Whitcomb v. Minchin*, 5 Madd. 91; *In re Bloye's Trust*, 1 Mac. and G., 488.) And I might dismiss this application upon that ground alone, if a question had not been raised by the affidavits, whether Brown really did purchase for himself, or whether he did not purchase for Goggs. I am disposed to think, upon a careful consideration of the evidence, that the purchase by Brown was only colorable, and that the property was, as stated, from information and belief, in the 11th paragraph of the joint affidavit of Messrs. Fraser and Bulcock, and not contradicted by the other side—for and on the part of Goggs. It is true that Brown is the registered proprietor of the premises under the *Real Property Act*; but that weighs little against the uncontradicted statement made in the second affidavit of White, that shortly after the sale of the property, he asked Brown "if Goggs would not give it back to him on payment of what had been lent, with interest;" to which Brown replied "that he had

no doubt he would do so, as all Mr. Goggs required was his own money." A trustee for sale cannot, without the express consent of his *cestui que* trust, which is not pretended to have been given in this case, purchase the estate upon which the mortgage is a charge. Whether, therefore, the purchase was made by Brown for himself, or on the account of Goggs, it would be voidable by a Court of Equity for constructive fraud; and that being so, I cannot allow Goggs to prove in White's estate, as he now seeks to do, for an unsecured balance of £258 12s. 8d., while the real value of the security which he holds is as yet unascertained. The application must be dismissed, with costs.

Re BIGGE & CO., *Ex parte* BANK OF AUSTRALASIA.

1866.
7th December.

Cockle, C.J.
Lutwyche, J.

Stamp duty—Lien on Wool—Mortgage—30 Vic., No. 14, s. 21—Appeal—Right to begin—24 Vic., No. 10.

A preferable lien on wool amounts to a mortgage within the meaning of the Act 30 Vic., No. 14, and is liable to stamp duty.

Where a case is stated for the opinion of the Court by the Stamp Commissioners, the appellant is entitled to begin.

Marquis of Chandos v. Commissioners of Inland Revenue (6 Ex. 464) followed.

Special Case stated by the Commissioner for Stamps under s. 21 of 30 Vic., No. 14, raising the question whether a lien on wool, granted under 24 Vic., No. 10,* constituted a mortgage for the purpose of becoming chargeable with stamp duty.

Bigge & Co. had given a preferable lien over their wool to the Bank of Australasia, and the Commissioners for Stamps contended that such a lien was a mortgage and liable to duty under the *Stamp Duties Act of 1866*. The duty had been assessed and paid.

Harding, for the Commissioners, claimed the right to begin.

Cockle, C.J., referred to *Marquis of Chandos v. Commissioners of Inland Revenue* (6 Ex. 464; 20 L.J., Ex. 269); and *R. v. Speller* (1 Ex. 401; 17 L.J., M.C., 9), and *Potter v. Commissioners of Inland Revenue* (10 Ex. 147) were also cited.

The Court were of opinion that the appellant should begin.

Pring, for the appellants, contended that a preferable lien on wool, under 24 Vic., No. 10, did not amount to a mortgage, inasmuch as no property passed to the lienee, but a mere right to possession exercisable under certain circumstances. The intention of the Legislature to charge such a security should have been plainly evidenced, as the *Stamp Duties Act* was penal in its nature (Dwarris on Statutes 646). The contract was for a future lien. He cited also *Tomkins v. Ashby* (6 B. & C., 541); *Warrington v. Furbor*, 8 East 242), 27 Vic., No. 3 (3 Pring, 205); Smith's Compendium (2nd Edit. 374.)

Harding was not called upon.

Per Curiam. We think that the lien amounts to a mortgage within meaning of the Act, and the determination of the Commissioners will, therefore, be confirmed.

Solicitors for the appellants: *Roberts & Hart.*

* See 31 Vic., No. 36, s. 27.

Re COSTIN, *Ex parte* COMMERCIAL BANKING CO. OF SYDNEY.

1866.
7th December.

Lutwyche, J.

Insolvency Act of 1864 (28 Vic., No. 25) s. 100—Jurisdiction—Equitable assignment of money to be acquired in futuro—Insolvency of Assignor.

In equity an assignment may be made of money to be subsequently acquired, and, if made for a valuable consideration, such an assignment will prevail over the claim of the Official Assignee in the event of the assignor becoming insolvent.

C., as security for advances made by a bank, directed, in writing, the Immigration Agent to pay the bank all moneys due or to become due to him. The bank made advances and received payments from time to time. C. became insolvent, and the balance due to him was paid to the Official Assignee.

Held, that there had been an equitable assignment which operated on the money as it became due, and that the bank were entitled to the balance.

Holroyd v. Marshall (33 L.J., Ch., 193) followed.

MOTION on behalf of the Commercial Banking Co. of Sydney to make absolute an order *nisi* under s. 100* of *The Insolvency Act of 1864*, calling on the Official Assignee in the insolvent estate of W. J. Costin, to shew cause why he should not pay to the applicants the sum of £206 15s. 5d., paid to him by the Immigration Agent, which sum, it was alleged, had been assigned to the Bank by Costin.

The facts appear in the judgment.

Lilley, A. G., for the applicants, to move the rule absolute.

Pring, for the Official and Creditors' Assignees, shewed cause.

LUTWYCHE, J. In this case an application was made by an order *nisi* obtained by the bank under the 100th section of the *Insolvency Act of 1864*, for payment of the sum of £206 15s. 5d., which it was contended had passed to the bank by virtue of an equitable assignment made by Costin before his insolvency. Mr. Pring, who appeared for the Official and Creditors' Assignees to resist the claim, objected *in limine*

*28 Vic., No. 25, s. 100, enacts that "In case of any claim dispute or difference between the official assignee the creditors' assignee and the creditors or any such persons or between any persons claiming under a trust deed of composition or arrangement relating to any insolvent's estate or to any money or property claimed as part of the estate of any insolvent either party may apply to the court and it shall be lawful for the court to determine the same and to summon and examine on oath the official or creditors' assignee trustee or any other person whomsoever as to any matters and things concerning the insolvency or trust estate and to direct such inquiries and give such directions and make such orders relative thereto as shall to the court seem just and expedient and to award costs personally or in any other manner against the official or creditors assignee trustee or any other person.

Re Costin, *Ex parte* Commercial Banking Co. of Sydney.

Lutwyche, J.

to the want of jurisdiction in the Court, and argued that the application should have been made to a Court of Equity. But a Court sitting in Insolvency exercises a mixed jurisdiction, taking cognizance of questions which arise in equity as well as at law, and there is nothing in the language of the 100th section of the *Insolvency Act* which abridges the powers which have hereto been considered to be inherent in such a Court. On the contrary, it would seem, from the general and comprehensive terms in which the section is worded, that it was the intention of the Legislature to refer every kind of dispute between creditors and assignees to the summary jurisdiction of the Court, provided the Judge shall think fit to entertain the application. And, although cases may arise—one, indeed, has already arisen—in which the Judge sitting in Insolvency could not interpose, for want of that machinery which can be effectively directed by a Court of Equity only, yet whenever the facts are clear he can, and I think should, do his best to afford the parties interested that cheap and speedy remedy which the Legislature manifestly contemplated.

The facts of the present case are simple enough. On or about the 17th July last, the insolvent told Mr. Robert Gibson, the Manager of the bank, that he had money due and *coming due* to him from the Immigration Department of the Government of the colony, in respect of certain contracts entered into by him with the Government. Mr. Gibson requested the insolvent to assign such moneys to the bank, as a security for the due payment of any moneys which the bank might thereafter advance to him; and told him that unless the bank were authorised to receive the moneys from the Immigration Department, they would not advance any money. Accordingly, on the 17th July, Costin delivered to Mr. Gibson a letter in the following terms:—"To John McDonnell, Esq., Immigration Agent. Please pay to the Commercial Bank, Brisbane, all moneys now due or to become due to me, whose receipt will be a sufficient discharge for same Amount now due, £247 12s. 11d.

Wm. Jno Costin."

The bank subsequently advanced to Costin the sum of £5,032 15s., and received from the Immigration Agent various sums of money, reducing the claim of the bank against the insolvent, in respect of the sum thus advanced, to £2,164 9s. 6d. On the 19th September following, Costin wrote a letter to the Immigration Agent, purporting to countermand the order given to Mr. Gibson, on the 17th July and after Costin had been adjudged insolvent, the Immigratian Ager

paid into the hands of the Official Assignee the sum of £206 15s. 5d., which had become due to Costin, in respect of his contracts with the Government.

Mr. Pring did not go so far as to dispute that the letter of the 17th July did not operate as an equitable assignment to the bank of the choses-in-action designated by the words "moneys to become due;" but he argued that as the sum of £206 15s. 5d. had not been reduced into possession by the bank at the date of the insolvency, the assignees had a preferable title to the money. As to the first point, the leading authority, *Row v. Dawson* (1 Vesey, 331, 2 White and Tudor's L. C. in Equity, p. 612), which runs very nearly on all fours with the present case, is decisive. The form of the order in *Row v. Dawson* was as follows:—"Out of the money due to me from Horace Walpole out of the Exchequer, *and what will be due at Michaelmas*, pay to Tonson and Conway, value received." But it was held in that case that no particular form of words was necessary to create an equitable assignment, and that it was enough, if there was an agreement for valuable consideration beforehand, to lend money on the faith of being satisfied out of a particular fund. It may be inferred, from the form in which the suit was brought, the assignees under the commission of bankruptcy being the plaintiffs, that the point upon which Mr. Pring relied did not arise in that case, as the equitable mortgagees had reduced the choses-in-action into their possession before the bankruptcy. But a recent authority of the highest kind, referred to by the learned Attorney-General in the course of his argument for the bank (*Holroyd v. Marshall*, 33 L. J., Ch., 193), has now laid it down as settled law, that although property which may be made the subject of an equitable assignment be not in existence at the time of its execution, the agreement will operate upon the property as soon as it comes into existence. The case was twice argued before the House of Lords, Lord Chancellor Westbury and Lords Wensleydale and Chelmsford being the law lords present during the second argument, and the House reversed the judgment of Lord Chancellor Campbell, Lord Wensleydale changing the opinion which he had formed during the first argument, and acquiescing in the opinions expressed by Lords Westbury and Chelmsford. The decision is remarkable as well as important, from every point of view, and the result is that the order *nisi* must be made absolute, but, under the circumstances, without costs.

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POLLOCK *v.* MACKENZIE.

[IN BANCO]. 1866. *30th August. 10th October.*

Cockle, C.J. Lutwyche, J.

Contract—Sale of cattle—Delivery—Time of Payment—Promissory note—Credit—Damages for breach.

By an agreement, dated 15th August, 1865, the defendant agreed to sell, and the plaintiff to buy, 1,200 head of cattle, £4 per head for bullocks, and £3 for cows, the cattle to be delivered at C, approval being taken on the station in monthly drafts of 100 head, more or less, delivery to commence early in December, 1865, on a day to be agreed upon, and to continue over twelve months, payment to be made by approved endorsed bills at three months, dated from the day of delivery.

As plaintiff did not give defendant an approved indorsed bill when demanded on 15th February, defendant refused to deliver any more cattle.

A draft of 100 were delivered on the 4th February, and payment made for the same on 22nd February.

Upon an action for breach of the agreement, Lutwyche, J., directed the jury that payment was to be made at C; that payment and delivery were not concurrent acts; that delivery was to precede payment; that payment was to be made to defendant, wherever he happened to be, or his authorised agent, and that the time of payment was three months after delivery at C.

Held, that the defendant was not entitled to avoid the contract, and that the plaintiff was entitled to damages, including his expenses incurred in going for delivery which was refused.

Held, also, that where an agreement is made that a bill at a certain date should be given in payment for goods, that agreement operates as a giving of credit, and debars the seller from suing for goods sold and delivered before the period when the bill, if given, would have become due.

APPLICATION on behalf of defendant to make absolute a rule *nisi*, pursuant to leave reserved at the trial of an action for damages for breach of contract, to have the verdict entered for the defendant or for a reduction of damages, which had been assessed at £165.

The facts appear in the head note and the judgment.

Lilley, A.G., for the defendant, contended that there was a breach of the contract which entitled the defendant to rescind, (*Withers v. Reynolds*, 2 B. & Ad. 882).

Pring, for the plaintiff, showed cause and cited *Boorman v. Nash*, (9 B. & C. 145).

C. A. V.

10th October.

POLLOCK v. MACKENZIE.

Cockle, C.J. Lutwyche, J.

COCKLE, C.J., delivered the judgment of the Court as follows:—

By agreement dated 15th August, 1865, the defendant agreed to sell, and the plaintiff to buy, "1,200 head of fat cattle, more or less, consisting of bullocks and cows, for the sum of four pounds (£4) per head for bullocks and three pounds (£3) per head for cows. These cattle to be delivered at Colinton, approval being taken on the station, in monthly drafts of 100 head, more or less; delivery to commence early in December, 1865, on a day to be agreed upon, and to continue over twelve months; payment to be made by approved endorsed bills at three months, dated from day of delivery." The learned Judge directed the jury "that payment was not to be made at Colinton; that payment and delivery were not concurrent acts; that delivery was to precede payment; that payment was to be made to defendant wherever he happened to be, or his authorised agent; and that the time of payment was three months after delivery at Colinton." By consent "station" was taken to mean the defendant's station. A verdict having been found for the plaintiff, the Attorney-General, pursuant to leave reserved by Mr. Justice Lutwyche, before whom the case was tried, moved for and obtained a rule *nisi* to enter a verdict for the plaintiff, or to reduce the damages. The grounds of the rule were: that the above direction was wrong, and that there was a misdirection as to, and a wrong assessment of, damages. The objection to the amount of damages was that it included the expenses incurred by the plaintiff in going to the station to obtain delivery of a draft of cattle, delivery of which was refused. These expenses are mentioned as special damage in the declaration, and we shall not disturb the verdict in this respect. Moreover, we think the above direction was right. Mr. Justice Lutwyche said that the conclusion at which he had arrived in reference to the true construction of this contract between the parties is fortified by several authorities not referred to at the bar during the argument. The Attorney-General cited *Withers v. Reynolds* (2 B. & Ad., 882) to show that payment was a condition, and that non-compliance with that condition entitled the defendant to refuse any further delivery of cattle. But in *Withers v. Reynolds* the Court held that each load of straw was to be paid for on delivery, and that the defendant clearly did not contemplate giving credit. On the other hand the cases of *Mussen v. Price* (4 East. 147), *Price v. Nixon* (5 Taunt. 338), *Helps v. Winterbottom* (2 B. & Ad. 431), and

POLLOCK v. MACKENZIE.

Cockle, C.J. Lutwyche, J.

Paul v. Dod (2 C. B., 800) fully established the principle that where an agreement is made that a bill at a certain date shall be given, it operates as a giving of credit, and debars the seller from suing for goods sold and delivered before the period when the bill, if given, would have become due. The defendant in this case might have maintained an action for a breach of the special condition to deliver an approved indorsed bill for the second draft of cattle; but it is difficult to believe that a jury would have awarded him more than nominal damages, as he was paid in cash three or four days after the breach of contract complained of by him. The result of our opinion is the discharge of the rule with costs.

Solicitor for plaintiff: *Doyle.*

Solicitor for defendant: *Browne.*

IN EQUITY.

In re THE BANK OF QUEENSLAND LIMITED.

1867.
8th, 25th Feb.

Lutwyche, J.

Company—Winding up—Foreign creditors—Right to share in assets.

In the winding up of a company in Queensland a decree was made that creditors in England were entitled to share with creditors in Queensland in the distribution of assets realised in Queensland.

APPLICATION by James Cairns, the provisional official liquidator of the Bank of Queensland Limited, for a decree in the nature of a declaration as to the right of creditors in England to share with creditors in Queensland in the distribution of assets realized in winding up the Bank in Queensland.

All the facts appear in the judgment.

C. A. V.

25th February, 1867.

LUTWYCHE, J. This was an application made by James Cairns, the provisional official liquidator of the Bank of Queensland, on the 8th February, instant. On that occasion he was appointed the official liquidator of the bank, and under the provisions of *The Winding up Companies Act*, the Court was prayed to make a decree in the nature of a declaration, with respect to the right of English creditors to share with Queensland creditors in the distribution of assets realized in Queensland. If I exclude the English creditors from participation in such assets they may, perhaps, have no remedy. The Court has no means to ascertain that there are any assets in England; and, if excluded from the benefit of the assets in Queensland, the English creditors may be completely deprived of any remedy. I must admit the English creditors to prove equally with those in Queensland. The Queensland creditors will not be damnified; they will be able to prove if any assets are realised in England, and if assets sufficient are not realised to pay them in full, they may institute proceedings against the shareholders as contributories.

The decree will be made in accordance with that view of the case.

IN EQUITY.

CHAMBERS *v.* BONAR.

1867.
17th April.

Cockle, C. J.

Real Property Act of 1861 (25 Vic., No. 14), s. 33—Sale by sheriff —Non-production of certificate of title—Vesting order.

When the vendee of land under the *Real Property Act* cannot produce the certificate of title a vesting order will be refused.

PETITION for a vesting order.

Certain land under the *Real Property Act* had been sold by the sheriff, under an execution, and purchased by the petitioner, The vendee did not, however, produce the certificate of title for the land, in respect of which he now sought a vesting order.

Lilley, A. G., for the petitioner.

COCKLE, C. J. Such orders have been made, and I believe on more than one occasion. The present differs from any preceding case in this, that it appears that the vendee is unable to produce the certificate of title delivered under section thirty-three of the *Real Property Act*. It seemed to me when the application was made that the objection was fatal, and that I could not make the vesting order without pre-judging the important question of the validity of equitable mortgages of a registered proprietor's estate.

Before coming to a conclusion I thought it right to ascertain the view taken by Mr. Justice Lutwyche on this point, and I find that my learned colleague considers such mortgages valid. Remembering that the present is an *ex parte* application, and that other equities may have arisen, I must refuse the order.

In re BEAUCHAMP, *Ex parte* KEANE.

1867.
24th June.
Lutwyche, J.

Real Property Act of 1861 (25 Vic., No. 14)—Removal of caveat—Costs against caveator—Public Officer.

An Official Assignee, who lodged a caveat against dealing with land under the *Real Property Act*, and allowed such a caveat to remain on the Register after he had parted with his interest in the land, was ordered to pay the costs of an application to remove the caveat.

No one but the person who lodges a caveat can withdraw it.

APPLICATION by Thomas Keane for an order directing William Pickering, Official Assignee, to show cause why he should not withdraw a caveat lodged by him on certain lands standing in the name of the applicant.

All the necessary facts appear in the judgment.

LUTWYCHE, J. During vacation an application was made to me in chambers, calling upon William Pickering, Esquire, Official Assignee in the insolvent estate of Charles Beauchamp, to show cause why the caveat lodged by him in the office of the Registrar-General, forbidding dealing with the land described in the Certificate of Title, No. 8033, Vol. 68, Folio 53, standing in the name of Thomas Keane, should not be ordered to be withdrawn from the records of the office of the Registrar-General; and why the said William Pickering should not pay the costs of the application. Upon the hearing of the application I made the order absolute for the withdrawal of the caveat, but reserved, for further consideration, the question of costs. As a rule, courts are always unwilling to grant costs against a public officer in the execution of his duty; but circumstances sometimes arise in certain cases in which this rule is departed from, and the present case is one of this nature. It appears from the affidavits that Mr. Pickering, as Official Assignee of the estate of Charles Beauchamp, sold all his right, title, and interest, as such Official Assignee, to a purchaser after he had lodged the caveat referred to in the application. So late back as October last he declined to accede to an application made by Keane and Fowles, to withdraw the caveat on the ground that he was not the person to

In re CRIBB, *Ex parte* CRIBB.

whom such an application should be made, but the purchaser. This, though an honest opinion, was a mistaken view of the law. No one but the person who lodged the caveat can withdraw it. This was pointed out to Mr. Pickering by Messrs. Keane and Fowles, but he declined to receive their advice. I am sorry, therefore, that I have no alternative but to award to Thomas Keane, a trustee for Marian Beauchamp, the costs of, and occasioned by, this application; and would have this act as a guide to Official Assignees as to the consequences of allowing a caveat to remain on a title after he has parted with all his right in the estate.

In re CRIBB, *Ex parte* CRIBB.

1867.
9th September.
21st October.

Lutwyche, J.

Insolvency Act of 1864 (28 Vic., No. 25) s. 129—Deed of composition—Stay of proceedings—Secured creditors—Majority of creditors.

In ascertaining whether a deed of composition has been executed by a majority of creditors, all the creditors must be taken into account, whether or not they have security for their claims, and, in the case of secured creditors, to the full amount of their claims.

APPLICATION by Benjamin Cribb, a creditor, for stay of proceedings in the insolvency of Robert Cribb.

The facts and arguments appear in the judgment.

Blake, for Benjamin Cribb, the creditor nominated by the meeting in support of the application.

Lilley, Q. C., to oppose.

C. A. V.

21st October, 1867.

LUTWYCHE, J. The Official Assignee of Robert Cribb's estate reported to the Court on 4th September last that, at a meeting of creditors duly convened and constituted according to s. 166 of *The Insolvency Act of 1864*, it was resolved that the estate should be wound up under a deed of composition, providing for the payment of

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half-a-crown to all the unsecured creditors; and that the secured creditors should be paid according to their securities. Twenty-eight creditors, whose debts amounted in the aggregate to £25,187 5s 4d., voted for the resolution; and four creditors, with debts amounting to £5,052 11s. 6d., voted against it. In the majority were four secured creditors, whose debts amounted in all to £17,711. The consideration of the report was adjourned until the following Monday, September 9th, when Mr. Blake applied to the Court on behalf of Mr. Benjamin Cribb, the creditor nominated for that purpose by the meeting, to stay the proceedings in the insolvency. The application was opposed by Mr. Lilley, on the ground that the four secured creditors who had voted with the majority were only entitled to vote in respect of the balance of their debts after deducting the value of their securities; and, secondly, that the terms of the proposed composition were neither reasonable nor calculated to benefit the general body of creditors. In support of the first objection, Mr. Lilley urged that the *Bankruptcy Act*, now in force in England (24 & 25 Vic c. 134), contains no section corresponding to s. 129 of our Colonial Act, which, he contended, is in terms similar to s. 244 (now repealed) of the Imperial Act, 12 & 13 Vic. c. 106. But a comparison of the two sections seems to show not only that they are not similar in their terms, but that they were enacted *diverso intuitu.* S. 129 of the Act of 1864 contemplates a proof by a secured creditor of the unsecured balance of his debt, as a condition precedent to his receipt of dividends with the other creditors in the estate, and is quite consistent with holding that, under ss. 166 and 167 of the same Act, the secured creditors shall have a vote proportionately to the full amount of their debts, in determining whether they will dispense with the machinery at the command of the Court, and wind up the estate under a deed of arrangement. The main question, then, is whether I shall be justified in so holding; and it seems to me that as the authorities stand at present, that question is placed beyond the pale of discussion. The decision of the Lords Justices in *Ex parte Godden, In re Shettle* (32 L. J., Bank. 37), followed by the Court of Common Pleas in *Turquand v. Moss* (33 L. J., C. P. 355), and again by the Court of Exchequer, confirmed on appeal by the Court of Exchequer Chamber, in *Whittaker v. Lowe* (35 L. J., Ex. 44), determines that the full amount of a secured creditor's debt must be taken into account in circumstances of this kind. It is true that some *obiter dicta* are attributed to Lord Chancellor Westbury, which

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favour Mr. Lilley's line of argument, and in *Re Stark* (35 L. J., Bank. 15), Lord Chancellor Cranworth went so far as to say that he thought the opinions expressed by Lord Westbury were more consistent with reason and good sense than the decisions of the Court before referred to; but he did not venture to overrule the authority of the Exchequer Chamber. Mr. Lilley's first objection, then, to the application being disposed of, I have only to consider whether the terms of the proposed deed of arrangement are reasonable, and calculated to benefit the general body of the creditors, and, seeing that the resolution has been agreed to by twenty-eight out of thirty-two creditors, I think I must find so. As was well observed by Mr. Blake in the course of his argument, the fact is proved in the best way possible, because the resolution was passed by the general body of the creditors, who may be fairly be presumed not to have assented to anything that was unreasonable, or not calculated to advance their interests; and it seems, from authorities cited at p. 746 of Smith's Mercantile Law (Edition 1865), that the inclination of the courts at home is to throw the burden of proof to the contrary on the dissentient creditors. I, therefore, confirm the resolution, and order that the proceedings in the insolvency be stayed for one calendar month from the present date.

[IN BANCO].

COMMERCIAL BANKING COMPANY OF SYDNEY *v.* BOLGER.

1867.
3rd, 6th Dec.

Cockle, C. J.
Lutwyche, J.

Promissory note—Stamp Duties Act of 1866 (30 Vic., No. 14), ss. 8, 18 —Unstamped instrument—Plea.

A plea to an action on a promissory note that the note was not stamped at the time of making nor at any time prior to the commencement of the action, is bad.

DEMURRER in an action on a promissory note for £300 to defendant's plea that the said note was not stamped at the time of making, nor at any time before the action was brought.

The note was made by the defendant and indorsed to the plaintiffs.

Pring, A. G., *Lilley, Q. C.*, and *Blake*, for the plaintiffs, in support of the demurrer.

Griffith for the defendant.

Pring, A. G.: This defence cannot be raised by plea. The objection must be taken at the trial when the document is tendered. The non-stamping did not affect the validity of the contract. Section 18 of 30 Vic., No. 14 uses the word "until" and not "unless." Section 8 refers to a penalty. Ss. 10, 14 to the "holder" of a note. [*Bradley; v. Bardsley* (14 M. & W. 873); *Lazarus v. Cowie* (2 Q. B. 459); *Dawson v. MacDonald* (2 M. & W. 26); *Leroux v. Brown* (12 C. B. 801); *Canning v. Brown* (6 N. S. W. R. (L.) 169); *Semple v. Nicholson* (4 H. & N. 298); 31 Geo. III, c. 25, s. 19; 37 Geo. III, c. 136, s. 3; 55 Geo. III, c. 184 s. 8; and 3 & 4 Wm. IV, c. 97, s. 17 were referred to].

Griffith: Section 8 inflicts a penalty, and operates as a prohibition against payment. The plea was "illegality," which must be pleaded. Section 18 does not apply to promissory notes.

He cited *Hayward v. Smith* (4 Bing., N. C. 684); *Foster v. Taylor* (5 B. & A. 887, 1 Smith, L. C. 331); *Ritchie v. Smith* (6 C. B. 462); *Bensley v. Bignold* (5 B. & A. 335); *Wright v. Riley* (*Peake* 173); *Nixon v. Albion Marine Insurance Co.* (L. R. 2 Ex. 338; 36 L. J., Ex. 180).

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Pring, A. G., in reply, referred to Chitty's Contracts, (7th Edition) 623–4; *Bailey v. Harris* (12 Q. B. 905); *Smith v. Mawhood* (14 M. & W. 452); *Field v. Woods* (7 A. & E. 114).

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6th Dec., 1867.

COCKLE, C. J. All that we have to decide is whether the defence arising under s. 8 of *The Stamp Act* can be pleaded or not. Section 18 was referred to by both sides as bearing upon the action. It was contended by Mr. Griffith, in support of the plea, that it was not meant to apply to a promissory note, but only to deeds or instruments under seal. But if it did not apply to a promissory note, how would the matter stand? Section 8 renders it penal for any one to issue, or cause to be issued, or pay, or cause to be paid, any unstamped promissory note, but it does not declare that the contract thereby created shall be void. Another section of the same Act (s. 10) enables the holder of a promissory note to affix a stamp to it after it has been issued, thus showing that an unstamped note is not in itself void. Further, the 23rd section provides that upon production of the document at any trial it may be received in evidence without a stamp, provided the amount due were paid to the officer of the Court. With these sections before me, I think it is impossible that such a notion can be entertained, that the contract incurred by the signing of a promissory note can be declared void for the want of a stamp. Mr. Griffith has a right to avail himself of s. 18, and say that the note might be an instrument within the meaning of the section, and consequently could not be pleaded, or given in evidence, or available in law, or in equity, until it has been duly stamped. Supposing the note to have been duly stamped, I should probably not set aside the declaration, but order it to be amended, in order to meet the day upon which the stamp was affixed. The provision that it shall not be given in evidence until it is duly stamped appears to negative the notion that the contract was made void by the absence of a stamp. I do not wish to go minutely into the meaning of the words "good or available at law or in equity," because the expression "shall not be given in evidence," in the same sentence, shews that the contract could hardly be void *ab initio*. The plea is immaterial. Judgment will therefore go for the plaintiff.

LUTWYCHE, J. concurred.

In re CAMERON'S WILL.

1867.
December, 6th.
Cockle, C. J.

Will—Probate—Presumption of death at sea.

Probate of the will of a passenger by a ship which took fire and was abandoned was granted, evidence being given of the facts that a fruitless search had been made for two years and eight months for the passengers.

APPLICATION for a grant of probate of the will of Maria Cameron.

Blake for the executors.

From the affidavits it appeared that Maria Cameron was a passenger by the ship *Fiery Star* from Brisbane to England. The ship took fire on April 19th, 1865, and was abandoned by the passengers, among whom was the deceased, who left with the crew in four boats. The weather was boisterous when they left, and the deponent had no doubt that they perished in the storm. Search had been made for the missing boats, but nothing had been heard of them. Two years and eight months had elapsed, and it was believed that if any survivors existed some trace of them would have been found.

In the goods of Norris (1 Sw. & T. 6); *In the goods of Main* (Ib. 11); *In the goods of Bishop* (Ib. 303), were cited.

COCKLE, J. granted probate limited to testatrix's separate estate.

In re HASSALL AND OGG, *Ex parte* HUGHES.

1867.
11th December.

Lutwyche, J.

Insolvency Act of 1864 (28 Vic. No. 25) s. 126—Proof of debt—Lease—Claim for rent.

S. 126 of the *Insolvency Act of 1864* refers only to cases where rent is due and a right to distrain exists.

APPLICATION on behalf of Robert Little, as attorney for Henry Hughes, to move absolute an order *nisi* calling upon Thomas Skinner, Robert Sparrow, and James Gibson, trustees in the assigned estate of Hassall & Ogg, to show cause why the applicant should not be allowed to prove in the estate for the sum of £30 19s. 8d., being in lieu of rent from 1st April, 1867 (the last time to which rent had been paid prior to the assignment), to the date of the assignment, namely, the 26th June, 1867.

On the 21st November, 1860, Little, as agent for Henry Hughes, let to H. Buckley and H. V. Hassall a store in Ipswich for five years, at the rate of £130 per annum, payable half-yearly, on 1st April and 1st October in every year. Buckley & Hassall took possession. Some time after entering into possession Buckley & Hassall dissolved partnership, and the firm became that of Hassall & Ogg. In the latter end of 1862 the firm of Hassall & Ogg represented that they required certain additions, and proposed to make them themselves if Mr. Little would give them an extension of lease, to which Mr. Little agreed. On 16th January, 1863, Hassall & Ogg addressed a letter to Mr. Little, reminding him of his promise to extend the term of lease for five years from 1st August, 1862. Mr. Little replied confirming his former promise. No fresh lease was entered into, but Messrs. Hassall & Ogg continued in possession until 1st April, 1867. Upon 7th September, 1866, Messrs. Hassall & Ogg wrote to Mr. Little, offering a reduced rent for the premises, and stating that "the term of their lease would be up next month," to which letter Mr. Little replied on 3rd October, 1866, pointing out that it would not expire until the 30th September, 1867. On 28th March, 1867, Messrs. Hassall & Ogg wrote to Mr. Little, informing him that they had vacated the premises. On 26th June, 1867, Hassall & Ogg assigned their estate for the benefit of their creditors to Thomas Skinner,

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Robert Sparrow, and James Gibson, as trustees for their creditors, who now resisted the claim against the estate.

Lilley, Q. C., in support of the order *nisi*, contended that Hassall and Ogg, by paying the rent, had incurred the liability on the original lease, and that they were liable for rent due *pro tanto* between 1st April and the date of assignment. This should be allowed as a preferent claim. At any rate the claim must be allowed as a concurrent one for use and occupation. It was a tenancy from year to year.

Blake, for the trustees, submitted that the amount could not be recovered, as the section providing for the recovery of rent did not apply to broken periods of time, but only to cases in which rent was due, and the right to distrain existed. Here such a right did not exist.

LUTWYCHE, J. I am of opinion that, as the landlord could not have recovered his money as rent at the time of the assignment, he can not rank as a preferent, but only as a concurrent, creditor. The letter of the Act clearly refers only to those landlords who have a right to distrain, and, as the section created an exceptional case, I cannot authorise the extending of the operation of the statute beyond its strict and literal interpretation. An order will be made that the amount claimed be ranked among the concurrent claims. Costs will be allowed out of the estate.

In re FORSYTH & CO., *Ex parte* PETRIE AND OTHERS.

1867.
11th December.
15th December.

Lutwyche, J.

Loan by building society to a shareholder—Insolvency of shareholder—Right of society to prove in estate.

A Building Society advanced money to one of its shareholders, who subsequently assigned his estate.

Held, that the Society, having dealt with the insolvent as an intending freeholder, and not in the ordinary course of business, could not compete with the creditors of the shareholder, and a claim to prove for the balance of the cash advanced was disallowed.

Application by R. S. Warry, J. Petrie, and G. Edmondstone, trustees of the Queensland Building Society, to make absolute an order *nisi* calling upon the trustees of John Forsyth & Co. to show cause why the applicants should not be allowed to rank as creditors in the estate of Forsyth & Co. for the sum of £212 1s. 4d., and why the sum of £53 0s. 4d., being a dividend of five shillings in the pound, should not be paid to the trustees of the said Building Society.

Forsyth, who assigned his estate for the benefit of his creditors on 11th October, 1867, had borrowed, on the security of his shares, £500, and given a mortgage of freehold property which had been valued at £100. The instalments had been duly paid up to the date of the assignment. The trustees of the Building Society claimed against Forsyth for money due in instalments and interest up to the date when the security would terminate, if carried on according to the rules.

Blake to move the order absolute.

Lilley, Q. C., to show cause. The Society has not been properly registered. It was registered under the *Friendly Societies Act*, 17 Vic., No. 26, s. 1, whereas it was merely a partnership. It ought to have been registered under the *Building Societies Act*, 11 Vic., No. 10. The trustees of the Building Society could only prove after payment in full of all the other creditors. (Dixon's Partnership, p. 209; *Ex parte* Harris 2 V. & B. 429; 1 Rose 437).

Blake, in reply, cited Lindley on Partnership, p. 996.

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15th December, 1867.

In re FORSYTH & CO., *Ex parte* PETRIE AND OTHERS.

Lutwyche, J.

LUTWYCHE, J. This was a case in which John Forsyth was carrying on business as John Forsyth & Co. The Queensland Building Society claimed to prove for a debt due to them for the balance of cash advanced, £500. With reference to the first point raised by Mr. Lilley, that the Society had not been duly registered, I have not formed any opinion, as the case has not been duly argued on both sides; and, under the view I take upon another point, it is highly improbable that it will ever arise in practice.

With reference to the third point of Mr. Lilley's argument, that the trustees could only prove against Forsyth after payment in full of the other creditors, Mr. Blake did not dispute that fact, but said that it was controlled by an exception "that if one of the two firms, carrying on distinct trades, becomes the creditor of the other in the ordinary way of their trade, the creditor firm may prove against the joint estate of the debtor firm, in competition with its other joint creditors, although one or more persons may be partners in both firms." But there is a question whether the rule applies to the circumstances of this case. There are two considerations involved. The first is, whether the Queensland Building Society is a trading firm, and also, whether the debt was contracted by a debtor in the ordinary course of business. Mr. Blake seemed fully alive to this point when he instanced a recent case as illustrating the exception urged in his argument. With reference to the point whether the Queensland Building Society was a trading firm, and also, whether the debt was contracted by a debtor in the ordinary way of business—all traders must carry on business with all the world who choose to deal with them for the commodities they may vend. The object in this Society is to enable shareholders to purchase freeholds or profitable interests in land. In the Society the general body of the partners lend only to individual shareholders. But, apart from this objection, assuming that this Society is a trading association, this loan could not be alleged to be a transaction in the ordinary way of business (*Ex parte Sillitoe*, 1 G. & J. 374; *Ex parte Williams*, 3 M. D. & G. 433). In the latter case two of the members of an iron company carried on a distinct trade as bankers, but were not the ordinary bankers of the company. They made advances at interest to the company for the purpose of relieving it when in a state of difficulty and pressure, without taking or asking for any security, leading to the inference that these advances would not have been made if the bankers had not been

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partners in the iron company. The company became bankrupt. The Court, per Knight Bruce, V. C., quoting *Ex parte Sillitoe*, held that the advances, though made in fact by the bankers, were not, consequently, dealing between trade and trade, giving a right of proof against the estate of the company—the use of the facilities afforded by a trade not being necessarily a use of them in a trade itself. In this case it was admitted that Forsyth was a draper; he traded under the name and style of Forsyth & Co. Supposing, for a moment, that the firm had been Forsyth & Fox. Mr. Blake contended that they could only go against the separate estate of Forsyth alone. How could they now come into competition with the creditors of Forsyth & Co.? They would be unable to do so, had such a firm of Forsyth & Fox existed, because this was clearly a transaction in which Forsyth was concerned, not as a draper in the way of his trade, but in a relation to the Friendly Society which enabled him to purchase freehold. This, certainly, was a high and praiseworthy ambition; but, like many others, it was "but only a vaulting ambition which overleaps itself and falls on the other side." The Building Society dealt with Forsyth as an intending freeholder, not as a draper; they, therefore, could not come into competition with the creditors of Forsyth & Co. The claim is disallowed with costs.

In re McLEOD.

Real Property Act of 1861 (25 Vic., No. 14), s.s. 30, 44, 82, 87, 100—28 Vic., No, 25, s. 88—Caveat by Official Assignee of insolvent against sale of property of insolvent's wife—Life interest of husband—Fraud—Address of caveator.

[IN BANCO.]
1867.
27th November.
1868.
6th March.

Cockle, C. J.
Lutwyche, J.

Where land under the *Real Property Act* is registered in the name of a married woman, the husband has a life interest in the rents and profits, and the land cannot be transferred without his concurrence.

Where a husband transfers land to his wife before insolvency, the registration of the wife as proprietor is fraudulent and void as against the Official Assignee, who may lodge a caveat against the sale of such land.

SUMMONS on behalf of Alexandrina Simpson McLeod, wife of James Alexander John McLeod, of Bowen, insolvent, calling upon Alexander Raff, Official Assignee, to show cause why a caveat, forbidding the sale of certain land, the property of the said Alexandrina Simpson McLeod, should not be withdrawn.

Harding, for Raff, raised a preliminary objection that the summons in chambers had been taken out by an attorney of a married woman, no husband or next friend being mentioned.

Lilley, Q. C.: The husband had no interest, and was represented by the Official Assignee who lodged the caveat. Under s. 99 of the *Real Property Act of 1861*, the wife was the only person who could take out the summons.

Leave to amend was given upon the applicant undertaking to make the proceedings regular, and pay the costs of the amendment.

Lilley, Q. C.: The address of Mr. Raff is not given as required by sections 99, 100. Raff had no interest; Mrs. McLeod holds the land absolutely.

Harding: S. 102 provides a shorter mode of cancelling the caveat. The lands were conveyed after coverture, and paid by notes indorsed by McLeod, and proved against the joint estate. Section 17 preserves "dower." By s. 44 the policy of the Act was paramount.

Counsel referred to *Robertson v. Norris* (11 Q. B., 917, 1 Giff., 428); Smith's Compendium, 1083; Bright's Husband and Wife, p. 113; *Insolvency Act of 1864*, s. 88; *Michell v. Hughes* (6 Bing., 689); *Real Property Act of 1861*, (25 Vic., No. 14), ss. 1, 29, 30, 31, 82, 87, Williams on Real Property, 207.

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6th March, 1868.

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Cockle, C. J.
Lutwyche, J.

Cockle, C. J. It is clear on the face of the proceedings before the Court, that the husband had a life interest in the lands against which the caveat has been lodged, and the Court is unable to deprive him of that interest. The summons must be discharged.

Lutwyche, J. The summons sets out four grounds for the withdrawal of the caveat by the Official Assignee, but they resolve themselves into two, the first of which is that the caveat does not, as required by s. 100 of the *Real Property Act of 1861*, state the address of Alexander Raff, by whom the caveat was lodged. The caveat says "my address in the colony, as underwritten, is Alexander Raff, Official Assignee." There can be no doubt that any notice forwarded to him through the Post Office with such an address would come to his hand in due course. There are only two Official Assignees; and it was not even pretended during the argument that Mrs. McLeod did not know who Mr. Raff was, or where he was to be found. The second ground amounts to this:—That Alexandrina Simpson McLeod is the registered proprietor of the land, and that, consequently, under the provisions of s. 44 of the Act, her title is paramount to that of every one else. Without adverting to other reasons which induce me to think it would be unsafe to adopt this view, I think the question may be disposed of on the short ground of fraud. Section 44 excepts "fraud" in express terms, and I am of opinion that the registration of a married woman's name as the proprietor is fraud in law upon the husband. A conveyance to her would be good until his disagreement, but she acquires no right to transfer the land so conveyed without the concurrence of her husband. As a rule the husband is entitled to the rents and profits of the land during his lifetime, and in the present case it is sworn without contradiction that Mr. McLeod, before his insolvency, had a life interest in the land. The registration of Mrs. McLeod as proprietor, as if she were a *feme sole*, appears to me to have been fraudulent. The summons must be discharged with costs.*

* But see now the *Married Women's Property Act, 1890* (54 Vic., No. 9).

In re FRASER, *Ex parte* THE TOOWOOMBA LAND COMPANY.

Rent not due—Insolvency Act of 1864—Proof of debt—Preferent claim—Concurrent claim—(28 Vic., No. 25) s. 126.

[IN INSOLVENCY].
1868.
22nd January.
Lutwyche, J.

Where rent is payable quarterly, the landlord cannot prove a debt for rent *pro tanto* as a preferent claim.

Re Hassell & Ogg, Ex parte Hughes (ante p. 168), followed.

MOTION to admit proof of debt.

On October 9th, 1865, the Toowoomba Land Company, Limited, became the purchasers of the Queensland Arms Hotel, which was then under lease to William Fraser, the insolvent, for a period of five years, which lease was to expire on the 1st of July, 1867, at an annual rental of £262, payable quarterly. On the 15th November, 1865, the Company agreed to erect a billiard room at an additional rent of 20 per cent. per annum upon the cost of the erection. The billiard room cost £270, making the annual payment upon that £54 This, with the rent of the premises, was paid until the 1st of July. 1867. Fraser held over until the 21st of September, 1867, the date, of his adjudication.

The Company now sought to prove as a preferent claim for rent due during the period from the 1st July, to the 21st September, 1867.

Harding, for the Toowoomba Land Company, Limited, moved the admission of the proof of debt as a preferent claim.

LUTWYCHE, J. As I decided in a previous case, *In re Hassell & Ogg, ex parte Hughes*, (ante p. 168), the rent being paid quarterly, and the landlord being unable to recover the rent due at the date of the adjudication, I cannot allow the claim as preferent. I therefore allow it only as a concurrent claim.

R. *v.* GRIFFIN (No 1).

1868.
12th May.

Cockle, C. J.
Lutwyche, J.

Criminal law—Murder—Evidence—Other felonies—Admisibility of motive—Res gestae.

On the trial of a prisoner for murder, evidence is admissible of other felonies committed by him where they prove a motive for the commission of the crime or form part of the *res gestae*.

CROWN case reserved by Lutwyche, J., at the Rockhampton Assizes, held on March 16th, 1868.

The prisoner, Thomas John Griffin, was indicted for the wilful murder of John Power and Patrick Cahill, at the Mackenzie River, on the 6th November, 1867. At the trial, the Attorney-General, who prosecuted on behalf of the Crown, in opening the case, stated that the prisoner, who had been Police Magistrate and Gold Commissioner at Clermont, had received in that capacity from certain Chinamen various sums of money, amounting to £252, to be forwarded to Rockhampton; that he arrived in Rockhampton on the 19th of October, 1867, and was immediately applied to by the Chinamen, and by others on their behalf, for the money, but did not pay them then; that the deceased troopers were, on the 29th October, members of the Clermont gold escort; that on Tuesday, 29th October, the prisoner sent Power, one of the deceased, from the camp, about four miles from Rockhampton, to the bank for certain money to be conveyed to Clermont, and that Power received from the bank four parcels, each containing 1,000 £1 notes; that Power returned to the camp the same evening without any money or parcels; that prisoner obtained the money from Power when he got out of town, and that the money remained in his possession till Friday the 1st of November; that on Wednesday the 30th October, he met the Chinamen before referred to at the Club in Rockhampton, and repaid them the money he had received from them at Clermont in £1 notes which had been among those delivered to Power on the previous day by the bank; that, on the 1st of November, the prisoner, at the request of Power and Cahill, with whom he was about to start on the road to Clermont, sealed up with his own seal in a canvas bag the parcels of notes then in charge of

the deceased; that the prisoner, having robbed the parcels, and having sealed the bag, was apprehensive that on the arrival of the escort at Clermont the robbery would be discovered and that he would be accused; and that to save himself he accompanied Power and Cahill on the road as far as the Mackenzie River, and there murdered them. Evidence was given at great length, tending to prove that the prisoner, before leaving Rockhampton, had taken some of the notes from the parcels. The whole of that evidence was objected to by the prisoner's counsel, on the ground, among others, that evidence of one felony was not admissible against a prisoner charged with another distinct felony. The evidence was, however, admitted; but Lutwyche, J., before whom the action was tried, reserved the point of the admissibility of such evidence for the opinion of the Full Court.

The prisoner was convicted and sentenced to death.

MacDevitt, Hely, and Griffith, for the prisoner. With regard to the objections raised against the admissibility of the evidence, the Court has to decide whether the evidence tending to prove the abstraction of the notes was admissible, inasmuch as it was evidence of a distinct felony from that with which the prisoner was charged in the indictment on which he was tried. In considering whether that evidence was properly received or not, it is necessary to refer to the general rules of law as to the admission of testimony to understand how far evidence can be received of points not in issue before the Court. It has been laid down that the general rule upon the subject, in criminal as well as civil cases, is, that nothing should be given in evidence which does not directly tend to prove or disprove the matter at issue (Archbold's Criminal Practice, page 200). In criminal proceedings evidence must be confined to the point in issue. Where a prisoner is charged with an offence, it is of the utmost importance that the facts laid before the jury should consist exclusively of the facts charged in the indictment. It is a general rule that the facts proved must be strictly relevant to the particular charge. It is not allowable to show upon the trial on a particular indictment that the prisoner has a disposition to commit the same kind of offence as that for which he stands indicted (3 Russell on Crimes, Book v., Cap. II, p. 279, s. 2). One of the chief objects of an indictment being to afford distinct information to the prisoner of the specific charge about to be brought against him, the admission of any evidence unconnected with that charge must clearly be open to the serious objection of taking the

R. v GRIFFIN (No. 1).

Cockle, C.J. Lutwyche, J.

prisoner by surprise. No man can be called upon, or be bound at the peril of life, liberty, fortune, or reputation, to answer at once, when unprepared, for every action of his life (Taylor on Evidence, Vol. I, p. 303). The rule to which allusion has been made is qualified by numerous exceptions (to which reference will briefly be made) which the proper dispensation of justice requires; but the evidence which has been admitted does not come within any of the exceptions. 1. The first exception is the inseparability of the transaction. When the several felonies are so mixed up as not to be separated without great inconvenience to the prosecutor, evidence of all will be admitted (3 Russell on Crimes, 285; *Rex. v. Hinley*, 2 M. & R. 524). Upon that first exception evidence of the nature of that which has been allowed at this trial cannot be admitted, unless the grounds for its admission are so strong, so patent, and so urgent, as to override the proposition so clearly laid down by the authorities quoted. 2. The next exception is when the felonies are so connected as to form one entire transaction. Where several felonies are connected together and form part of one entire transaction, evidence may be given on the hearing of a charge of one of them to show the character of the others (3 Russell, 281; *Rex. v. Ellis*, 6 B. & C., 145; *R. v. Birdseye*, 4 C. & P. 386; *Rex. v. Wylie*, 1 New Rep. S. C., 94; Taylor on Evidence, p. 334). Evidence of the robbery which took place several days, if not a week, before the crime with which the prisoner was charged, if admitted at all, should have been admitted on the ground that it formed part of one entire transaction. In most cases in which such evidence has been admitted there were felonies of the same character. 3. The third exception, to ascertain the identity of the article stolen, does not bear much upon the case. In cases in which it is necessary to identify the articles stolen, evidence of felonies other than the one charged in the indictment is admissible (3 Russell, p. 280). 4. The fourth exception is to prove guilty knowledge. When it becomes necessary to prove guilty knowledge on the part of the prisoner, evidence of other felonies committed by him, though not charged in the indictment, are admissible for that purpose (3 Russell, p. 287; Archbold, p. 201; Taylor, p. 341; *Rex. v. Oddy*, 2 Den., C. C. 264). Before the Court can allow the evidence of the robbery, they must decide whether evidence of the possession of the stolen property by the prisoner in Rockhampton was evidence of his murder of the troopers some days after. 5. Evidence of other felonies than that charged in the indictment

may sometimes be admitted to prove guilty intent, but the possession of the stolen notes does not tend to prove that the prisoner intended to murder the troopers, and therefore the evidence is inadmissible. (3 Russell, page 288. Taylor, page 341). Such evidence is usually admitted when there is a question of malice, but the evidence was not offered upon that ground in the present case, and there was no direct evidence to support such an assertion.

LUTWYCHE, J. Does not the evidence tend to show premeditation or deliberation on the part of the prisoner?

MacDevitt: Still evidence of premeditation is not admissible unless it comes within some recognised exception to the rule, which says that no evidence shall be given except that which goes directly or indirectly to prove the guilt or innocence of the prisoner, and evidence of *malice prepense* must have reference directly to the act of murder. Even if the prisoner admitted that he had committed another felony, it could not be used as evidence against him in the case he was being tried for. On the grounds mentioned the conviction cannot stand. He cited also *R. v. Clewes* (4 C. & P. 221); *R. v. Ellis* (6 B. & C 147); *R. v. Oddy* (2 Den. C.C. 264); *R. v. Butler* (2 C. & K. 221); *R. v. Geering* (18 L. J., N. S., M. C. 215); *R. v. Toke* (Roscoe's Nisi Prius 288).

Pring, A.G., and Lilley, Q. C., for the Crown.

COCKLE, C. J. We will not trouble the learned counsel for the Crown.

Pring, A. G.: It might assist the Court if I refer to the cases of *R. v. Palmer* (see Report in Wills on Circumstantial Evidence) in which evidence of a forgery committed by the prisoner was given in support of the charge of murder; *R. v. Courvoisier* (9 C. & P. 362); *R. v. Garner* (3 F. & F. 681); and *R. v. Dossett* (2 C. & K. 306).

COCKLE, C. J. It is due to Mr. MacDevitt, who has zealously and learnedly argued the case on behalf of the convicted prisoner, that the Court should give the reasons for the decision to which we have now come. We fully assent to much, or the greater part, of what has been energetically urged upon us by Mr. MacDevitt. If evidence were tendered when a man is on his trial for one offence, of his having been guilty of another offence, and if such evidence were tendered for the purpose of showing that he was a man of vicious disposition, and therefore likely to have committed the offence for which he was tried, such evidence would be not merely irrelevant, but inadmissible, and its admission would vitiate the

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verdict. Supposing that, in the case of a man on his trial for one offence, evidence is tendered to show that he had been reasonably suspected of having committed another offence, and that he was a man of bad reputation and character, and so the more likely to have committed the first offence, such evidence would be clearly inadmissible, and would also vitiate the verdict. The Court will even go the length Mr. MacDevitt has gone, and say that if a man were on his trial for one offence, and evidence were tendered to show that he had admitted that he had perpetrated and committed an offence like that for which he was being tried, and that he had been tried, and that he had a strong predisposition to commit the offence, then such evidence ought to be excluded, and if admitted the verdict would be vitiated. But, supposing evidence were tendered which, while inadmissible on account of some of the reasons I have stated, was admissible on some other ground, why then the single ground for admission would override all the grounds for exclusion, and the evidence must be admitted in the case to be dealt with, according to the rules of law and evidence, by the tribunal before which the man was being tried.

Now, is there any reason in the present case which will justify the admission of evidence apparently so open to objection? What was the first enquiry made when the news of the crime was published? Why, what could have been the motive of the perpetrator? Surely no ordinary reasoning man would see in that anything objectionable; it is a question not only most natural, but one the solution of which is most important for the purposes of justice. Now, Mr. MacDevitt appeared to say that a motive was not by that name included amongst the cases for exception to the usual rule of exclusion, although he mentioned "intent" as one of the exceptions. It is not necessary for the Court to say, nor perhaps would it be very easy to point out the precise distinction between motive and intent, but I can see many cases in which motive and intent have almost the same meaning. For instance, a man is charged with shooting a man with intent to kill him. What was his motive? To kill this person; why there is his intent and motive. He shot at the man with intent to kill him, and his motive in shooting was to kill him. So that is the possible distinction between the words motive and intent. In the present case, assuming on the facts as stated, that there was a robbery which had been committed prior to the commission

of the murder, can it be said that the result of the murder would not be to render an enquiry into the circumstances of the robbery more difficult, and that it would tend to baffle the researches of justice into the commission of the robbery? If such were the result, would it, in the mind of the person who committed the robbery, be an expected result of the murder? The tribunal before whom the case is tried must say whether the person against whom the evidence is offered would have sufficient intelligence to see that that might be the result, and, if they aimed at that conclusion, he must be taken to have expected it. Did the prisoner desire such a result? It is not necessary for them to say that he either expected it or desired it, but, if he expected it, he might desire it, and that would constitute a possible motive, which surely ought not to be excluded from a jury. It does not follow that the jury should be compelled to deem that motive a sufficient one to induce them to act upon it and convict the person accused. The Court has only to determine whether the evidence should be admitted, and we think that all motives which might have actuated the accused person are fairly matter to be laid before a jury, and it would be for them, in their own common sense, to determine what weight to attach to the circumstance. That, I think, being the case, the appeal must be dismissed.

LUTWYCHE, J. I agree with the Chief Justice that the conviction must be affirmed. It appears to me that any act may be given in evidence which would or might operate as a motive upon the mind of any man. If it did so, it may be given in evidence against the prisoner. The whole of the evidence which was objected to seems to me to form part of the *res gestae* of the case, and to be indivisibly connected one part with another, from the very beginning, when the prisoner received the money from the Chinamen at Clermont up to the commission of the robbery. Therefore that evidence contained facts which were brought before a jury to show the motive for the commission of the murder; or, at any rate, facts which might have induced any other man than the prisoner to commit the murder. When the robbery was once committed we come to the circumstances attending the murder, and we find that the bags were sealed at Power's request by the prisoner. If another man, placed in the same position as the prisoner, had committed the robbery, or was, or might be, in fear of apprehension,

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surely then evidence of the same facts might be given against the prisoner, not as furnishing an adequate motive, but as furnishing some motive, for acting as he did. The conviction must be affirmed.

Solicitor for prisoner: *Rees Jones.*

R. v. GRIFFIN (No. 2).

Mandamus—Circuit Court—Judge of Assize—Crown case reserved—Amendment—Comment on Judge's summing up—Question of fact—Criminal Practice Act of 1865 (29 Vic. No. 13), s.s. 48, 51.

[In Banco]. 1868. *15th May.* *Cockle, C.J. Lutwyche, J.*

Where a Judge of Assize has refused to state a point raised by counsel in a crown case reserved by him on other points, the proper time to bring the matter before the Full Court is on the hearing of the Crown Case reserved.

A comment made by the Judge in the course of summing up on the facts of the case is not a point of law that can be reserved.

Quaere whether a mandamus will lie against a Judge of Assize.

MOTION for a rule *nisi* for a *mandamus* addressed to the Judge of the Circuit Court, at Rockhampton, commanding him to state a case for the consideration of the Full Court.

The prisoner Griffin had been convicted on a charge of murder, and a Crown Case had been reserved, and judgment delivered thereon as above (ante p. 179).

All the other necessary facts appear in the argument of counsel and the judgments of the learned Judges.

MacDevitt and Griffith appeared to move for the rule *nisi*.

COCKLE, C. J. The Judge of the last Circuit Court, at Rockhampton, has stated a case for the Full Court, and the Court, after hearing it argued, has dismissed the appeal.

MacDevitt. The object of the present motion is to get the learned Judge to state a case containing and embodying an objection to his summing up.

COCKLE, C. J. The Court had power under the original case, if the matter had been suggested, to have remitted the case to the learned Judge. That was the proper time to have applied. If there was anything in the point the learned Judge would have remembered it.

MacDevitt. I submit the learned Judge refused to embody the objection in the special case submitted to the Full Court.

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COCKLE, C. J. Look at section 51 of *The Criminal Practice Act*, 29 Vic., No. 13.

MacDevitt: I have read that section; it says "The Judges, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended." There could be no object in applying under that section for an amendment of the special case, because the learned Judge had already refused to embody the objection in it. Section 48 of the same Act, however, lays it down that "When any person shall have been convicted of any treason, felony, or misdemeanour, before any Court of Criminal Jurisdiction within the colony, the Judge, or Chairman, or Justices of the Peace, before whom the case shall have been tried, shall, on the application of counsel, made during the trial, or without such application, in his or their own discretion, reserve any question or questions of law which shall have arisen on the trial for the consideration of the Judges of the Supreme Court, and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question or questions shall have been considered and decided." The learned Judge, at the trial, refused to state a special case to the Full Court embodying the objection taken at the trial, as he alleged it did not come within that section, as it was not a point of law but of fact. That is the reason why no application was made to the Court to send back the special case to the learned Judge who tried it, to embody that objection in it. He cited *Ex parte Inhabitants of Jarvin* (9 Dowl. 120); Tapping, p. 235.

LUTWYCHE, J. If the application had been made when the special case was being argued, and the Chief Justice had thought it was a point which ought to be embodied in that case, I would have embodied it, whatever my own opinion might be.

MacDevitt: I regret that that course has not been pursued. It was distinctly understood that the learned Judge who tried the case had consulted with the Chief Justice, and had determined that the only point he would submit to the Full Court was the one which has been already decided.

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LUTWYCHE, J. I spoke to the Chief Justice about it, but did not consult with him. I acted upon my own responsibility.

MacDevitt: The Circuit Court at Rockhampton is an inferior Court to the Supreme Court, and it was the duty of the Judge to have reserved any point of law raised in the course of the trial for the consideration of the Full Court.

LUTWYCHE, J. The Circuit Court at Rockhampton is a superior Court of Record. The presiding Judge at the trial was only bound to reserve points of law, and not matters of fact, for the consideration of the Full Court, and it rested with him to determine whether the points raised were matters of law or fact. It is clear no action can lie against the Judge of a Superior Court, except for refusing to sign a bill of exceptions. I would like to be shown some authority to show that a mandamus can lie against the Judge of a Superior Court.

MacDevitt: By *The Criminal Practice Act of 1865*, the Judge who tries cases in this colony is put upon the same footing as Justices of Quarter Sessions in England. It cannot be contended that a mandamus will not lie to a Justice of Quarter Sessions, or other judges of inferior Courts trying criminal cases, and why should it not be addressed to the Judges of courts of *oyer* and *terminer*

COCKLE, C. J. You could attach the Judge if that were so.

MacDevitt: I rely principally on the fact that His Honour. Mr. Justice Lutwyche, in summing up, told the jury "If the, prisoner did not commit the murder, who did? This is a question which you must answer for yourselves before you can give a verdict upon your consciences in this case." When the jury had retired I objected to that ruling, and asked the learned Judge to reserve it.

LUTWYCHE, J. That is quite correct, and I told you to sit down; that you were making comments upon my observations to the jury upon a question of fact. It was not the thing upon such a sad and solemn occasion to have an altercation with counsel; and having some tenderness, perhaps, for the inexperience of the three gentlemen who were engaged in defending the prisoner, I said I would take a note of the objection and speak to the Chief Justice about it. I did both.

MacDevitt: I submit that in cases in which a client's life and liberty are at stake, his counsel are justified in taking advantage of every chance which the facts of the case and the law permit.

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COCKLE, C. J. In the first place the Court is not satisfied that a *mandamus* will lie to a Judge of Assize, and therefore we will be spared the painful notoriety of having been the first Court probably to *mandamus* one of its own Judges. In the second place, I think that the proper time to have asked Mr. Justice Lutwyche to have placed an objection upon the case would have been when the Judges sat as a Court of Criminal Appeal to hear the case reserved, because then we might, if we had thought fit, have caused the case or certificate to be sent back for amendment. I have very grave doubts whether a *mandamus* will lie in any case, because the Court of Criminal Appeal is formed upon the model of the Court of Appeal in England, which consisted of the Lord Chief Baron, the two Chief Justices, and several other Judges. It may be some satisfaction to Mr. MacDevitt to know that the Court can see very well that even if the point had been before us when the special case was signed before the Court of Criminal Appeal, we would scarcely have invited the learned Judge who presided at the trial to amend his case. A Judge's summing up must not be regarded as consisting of a set of separate sentences, but must be taken as a whole. The part which has been objected to in the present case might, under one aspect, appear a very strong way of putting the matter to the jury; but yet, if the whole charge were considered, it might be the very best way of putting to the jury the true point which they had to decide. It was not a point of law that is wished to be reserved, but a criticism or comment on the learned Judge's summing up. I think the motion ought to be refused.

LUTWYCHE, J. The motion is made too late. A suggestion should have been made when the special case was being heard, for that would have been the time to have inserted the proposed amendment if the Court had thought such an amendment proper and desirable. I also think the point which was said to be a point of law was simply a comment made by the Judge in the course of his summing up on the facts in the case. As the Chief Justice has said, we must not look at isolated sentences, but at the whole of the summing up, in order to see the sense in which the words were used. They were used by me to convey to the jury my strong impression that the prisoner was guilty. It was only another form of saying "Nobody but the prisoner could have committed the deed."

[His Honour then read a considerable portion of his summing up from the *Northern Argus*, which contained, he said, the best report of his charge to the jury.]

CANNY v. CURTIS. I very much regret that the point has been brought before the Court, for it is very irregular. When I was in New South Wales the practice of replying upon a Judge's summing up prevailed a good deal too much in the Supreme Court. So far as lies in my power, I will take care to check that practice up here. I think the motion must be dismissed.

Solicitor for prisoner: *Rees Jones.*

CANNY *v.* CURTIS.

1868.
24th, 25th April. 5th May.
Cockle, C. J.

Injunction—Mining—Partnership, Dissolution of.

An injunction restraining an alleged partner from disposing of a nugget of gold discovered by such partner was, on consideration of the facts, dissolved.

The meaning of the term "mine" considered.

MOTION on behalf of defendant to dissolve an *ex parte* injunction restraining the defendants and each of them from disposing of a nugget lately discovered at Gympie Creek, known as "The Perseverance Nugget."

From the affidavits filed on behalf of the plaintiff it appeared that about December 2nd, 1867, the defendant, Charles L. J. Collin, the holder of a claim on Sailor's Gully, Gympie Creek Diggings, entered into agreement with the defendant, George Curtis, and the plaintiff, Michael Canny, who both at the time held miner's rights, to work the claim, whereby he was to receive one-third of the gold found, free of all charges, and the other parties to the agreement were to share the remaining two-thirds equally among themselves. Canny provided a tent to live in, a pick, and provisions sufficient to enable him and the defendant Curtis to perform their part of the agreement. They set to work in the claim, but about December 6th plaintiff had occasion to go to Maryborough, and accordingly was compelled to absent himself from the claim, leaving the working of it in the hands of the defendant Curtis, who employed a person named Valentine Brigg to work in it in the place of the plaintiff during his absence. On or about February 8th, 1868, a nugget, known as "The Perseverance Nugget," valued at £4,000, was found in the claim, and

Curtis took possession of it on the 12th of the same month, brought it to Maryborough, but did not inform the plaintiff that he had found it. On the 18th February, a letter was written by W. Barnes, solicitor for the defendants, to Edward Corser, the solicitor for the plaintiff, which was in effect a proposal that the defendant Curtis should pay to the defendant Collin the sum of £500 in full satisfaction of his and the plaintiff's claim upon the nugget, and that in case that sum was not accepted, the amount of his claim, and that of any person making a claim, should be referred to arbitration. On February 20th it was agreed between W. Barnes, solicitor for the defendant Curtis, and J. C. Lyons, the plaintiff's attorney, that the nugget should be deposited in the Commercial Bank until the formal submission to arbitration should be prepared and executed; that the submission should be prepared by the solicitor for Curtis, and that the same should be submitted for the approval of the plaintiff's attorney. On February 28th defendant's solicitor received a letter from plaintiff's solicitor, to the effect that defendant had, owing to some reports which had reached him, removed the nugget from the Commercial Bank, but that he had said that would make no difference to the pending submission to arbitration. On March 4th the defendant Curtis paid over to defendant Collin the sum of £750, the amount of his claim on the nugget. The plaintiff believed that the nugget had at that time been deposited with Robert Travis, a merchant at Maryborough, who had advanced Curtis the £750, and afterwards forwarded the gold to Sydney to be sold. The plaintiff also affirmed that he had heard that since December 15th the defendant Curtis had found, in addition to the nugget, large quantities of gold in the claim, and that the several articles provided by him had, even since the partnership was entered into, been used for working the claim.

From the affidavits filed by the defendant it appeared that, on December 2nd, the defendant Curtis entered into a written agreement with the defendant Collin and the plaintiff to work an alluvial claim at Sailor's Gully, Gympie Creek Diggings. The defendant Collin was to receive one-third of the gold found, free of all charges or expenses, and the remaining two-thirds were to be divided between the defendant Curtis and the plaintiff. The defendant Collin was to give the other two men the use of a pick, shovel, and bucket, towards working the claim, and his share of the gold was to be sold, and the proceeds transmitted to him by bank draft. At the time of entering upon that agreement neither the plaintiff nor defendant Curtis held

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miner's rights. The plaintiff provided 50 lbs. of flour (which he sold the day before he left the Diggings, and retained the proceeds for his own use), a piece of calico for a tent, some tea and sugar, and a pick which he left on the claim, but which was never used. In pursuance of the agreement, the plaintiff and the defendant Curtis commenced to work in the claim on December 3rd. The plaintiff left on December 5th, announcing his intention never to return, and never returned or offered to provide any man or other person to work the claim in his place. When he left the claim he told him, Curtis, the claim was useless, as there was no gold in it. The defendant Curtis denied that he employed Briggs to work as a substitute during the plaintiff's absence. Under the belief that plaintiff had dissolved the partnership on the 26th December, he wrote to the plaintiff requesting him to furnish him with a statement of the amount and particulars of what sum he had expended in necessaries. To that letter the plaintiff replied by message, conveyed by his brother, that he did not intend to make any claim against him, Curtis, for money expended in the purchase of articles for the use of the partnership. Briggs, at the request of the defendant Curtis, came to Gympie on January 4th, and entered into an agreement with him by which he was to get half the gold discovered by their joint labour, less his share of the expenses, and thereunder worked with the defendant Curtis until April 4th. Briggs had no knowledge that he worked as a substitute for the plaintiff. About February 18th, William Barnes, the solicitor for the defendant Curtis, was employed to negotiate a settlement of the claim of the defendant Collin to a share in the nugget. In the course of that negotiation he discovered that the plaintiff intended to prefer a claim, though none had till then been made, and, with a view of a final settlement, he wrote, without prejudice, to the plaintiff's solicitor. The defendant Curtis did not believe that any agreement had been made to deposit the nugget in the Commercial Bank, Maryborough, until a final submission to arbitration had been prepared, for, although he had been requested by the solicitor for the plaintiff to make such an arrangement, he had always declined to do so further than that if he removed the nugget he would let the plaintiff's solicitor know. The defendant Curtis never intended his solicitor to make any agreement that he should not remove the nugget from the Commercial Bank, where he had deposited it for safe custody, until the offer of settlement between himself and Collin or Canny was determined, though it was not his intention to

have removed it if that offer of settlement had been accepted; but, in consequence of the negotiation having been broken off, through a disagreement as to who should arbitrate on the claim, he did remove it. Curtis had not, other than the nugget, got gold exceeding £15 in value since December 15th. The nugget was sold and disposed of before March 20th, and part of the value received applied to pay £750 to the defendant Collin. From the affidavit of Henry Edward King, Resident Chief Commissioner at Nashville, it appeared that, from a search made in the books kept in his office for the registration of mining claims, there was no record of any claim or share in a claim registered by or in the name of the plaintiff at any time through the month of December, 1867.

Lilley, *Q. C.*, and *Harding*, appeared to move the dissolution of the injunction.

Blake, and *MacDevitt*, *contra*.

Lilley, *Q. C.*, The plaintiff has no case to sustain his injunction which was obtained by falsehood and the suppression of facts. The plaintiff swore that Briggs was employed as his substitute, but the evidence is clear that between him and Briggs there was no treaty of the kind, and that Briggs was never employed by Curtis as the plaintiff's substitute.

[COCKLE, C. J. I think Briggs distinctly disclaims acting as his representative.]

Upon that alone the plaintiff is not entitled to hold the injunction. The case in dispute is not one of ordinary partnership. Two men went out by agreement to dig for gold; the very essence of such a partnership is the labour, skill, experience, and discretion contributed by each man. Under the Gold Fields Regulations, if a claim were abandoned for a certain time, it could be jumped; therefore not only must there be mutual contribution of labour, but the actual presence of the men was required in order to keep the partnership up. Upon the plaintiff's own affidavits he abandoned his claim. After working for three or four days he got disheartened and left his claim and his partner, and, until after the finding of the nugget, never asserted his right to any of the proceeds of the claim. That is a clear case of dissolution of partnership. That Curtis was willing to avoid litigation was his only reason for offering to submit the matter to arbitration, and the letters written were without prejudice. Curtis never admitted Canny's claim to the nugget, which was found two months after he left the claim avowing

CANNY *v.* CURTIS. his intention never to return. There was a misrepresentation of the facts by the plaintiff. Curtis said that the agreement of Barnes did not show any actual agreement on his part to allow the nugget to remain in the Bank. Vice-Chancellor Wigram has laid it down that a plaintiff applying *ex parte* for an injunction comes, as it has been expressed, under contract with the Court that he will state the whole case fully and freely to the Court. If he has failed to do so and the Court finds, when the other parties apply to dissolve the injunction, that any material fact has been suppressed, or has not been properly brought forward, the case should not then be decided on its merits, as the plaintiff has broken faith with the Court, and therefore the injunction must be dissolved (*Castelli v. Cook*, 7 Hare 89; 18 L.J. Ch. 148).

Harding followed. The Court in Equity cannot aid anyone, who is shown to be quit of any responsibility in case of loss, to gain any share of the profits in case of ultimate success (Lindley on Partnerships 904–6). That doctrine is especially applicable to mining partnerships When the plaintiff left the claim he withdrew his capital, which was his labour, from the partnership. (*Prendergast v. Turton* (1 Y. & C. C. C. 98; 13 L. J., Ch. 268). There was evidence of a positive abandonment by plaintiff of his rights (*Clegg v. Edmondson*, 8 D. M. & G. 787; 26 L. J., Ch. 273; Lindley on Partnership, p. 906; *Jekyl v. Gilbert*; McNaghten's Select Ch. Cases 29). If the injunction is allowed to stand, and the defendant prevented from working his claim, the subject matter will be forfeited, and on that ground the injunction should be dissolved; he who seeks equity must do equity, and the plaintiff must therefore show that he is able and willing to perform his part of the agreement, and has fulfilled the duties incumbent upon him. The partnership is illegal *in toto*, *Armstrong v. Armstrong*, 3 My. & K. 64; 3 L. J. Ch. 101. It is illegal because it was formed for purposes forbidden by current notions of public policy (Lindley on Partnership 178), and because it was between a person duly qualified and one not (Ib. 183). It is illegal, because at the time it was concluded neither Curtis nor Canny had miners' rights. The gold was the property of the Crown. *The Gold Fields* (*Management of*) *Act* (20 Vic., No 29), Sec. 31 (Pring 624), Sec. 4, shows how the Queen can be divested of her rights to the gold by a person obtaining a miner's right. It is useless to sustain the injunction because, upon the face of it, it is an absurdity, as there is nothing in existence which the Court can deal with.

Blake: It is sufficient if there appears upon the whole of the evidence enough to induce the Court to preserve the subject matter in *statu quo*, whatever it might be, until the hearing of the case. If the Court finds, upon the evidence, that it is a proper subject to go to a hearing, it can sustain the injunction (*Elascott v. Lang*, 3 Myl. & C. 451. The Court should exercise its jurisdiction for the purpose of enforcing legal rights, and preventing mischief until the rights have been ascertained (*Saunders v. Smith*, 3 Myl. & C. 714, 7 L.J., Ch., 227; *Great Western Railway Company v. Birmingham and Oxford Railway Company*, 2 Ph. 602; 17 L.J., Ch. 243). It has been argued that the injunction must be dissolved if the whole facts of the case are not disclosed upon the bill and affidavits in support of the motion; that rule has been carried so far that the plaintiff is not himself to judge of the materiality of the facts. Every fact within his knowledge connected with the case must be brought to the notice of the Court, which alone can decide of its materiality. I quite coincide with that statement of the rule. Then the question arises, has there been suppression of facts which will disentitle the plaintiff to the relief which he sought? I am certainly surprised to hear it argued that because the defendant in his statement of the case gives a different version of the facts stated by the plaintiff, that, therefore, that amounts to a suppression or omission on his part. No such suppression or omission appears in the present case. With reference to Briggs being employed by the defendant to work the claim, as Canny did not know of any secret agreement between them, he was justified in believing Briggs to be employed in his place. There has been no such suppression or omission by the plaintiff as would lay him open to defeat, *Castelli v. Cook* (*supra*).

With reference to the next ground of objection, that at the time of the finding of the nugget, and for some time previously, there had been no partnership existing, as the acts and conduct of the plaintiff amounted to a waiver on his part, and that, therefore, the partnership had absolutely ceased, before such a rule as that should be acted on some authority should be cited. The law with respect to partnerships had been clearly settled. When no time is fixed for the continuance of a partnership it may be dissolved at any moment by either of the partners upon his giving notice to all the other partners of his intention to dissolve. If the defendant had liked to give the plaintiff notice of his intention to dissolve the partnership before the nugget was found, the accounts might have

CANNY *v.* CURTIS. Cockle, C. J.

been easily ascertained. The defendant has never taken such steps as were necessary to determine the partnership. A partnership, at will, may be dissolved by either of the parties at any time, but it must be dissolved upon notice by one party to the other. (*Vansandan v. Moore*, 1 Russ. 441; 4 L. J., Ch. 177; *Wheeler v. Vanwart*, 9 Sim. 193; *Featherstonhaugh v. Fenwick* 17 Ves. 307; *Crawshay v. Collins*, 15 Ves. 227; *Hall v. Hall*, 12 Beav. 414). Cases were cited from Lindley to establish the rule that the acts and conduct of one of the partners might be such as would relieve the other of the necessity of notifying his intention to dissolve, and that, therefore, the partnership was actually dissolved, and it was argued that mining partnerships were peculiarly open to that rule. The extent to which that rule ought to be carried has been defined by Lord Chelmsford (*Clarke and Chapman v. Hart* (6 H. L. C. 633).

MacDevitt followed. The Court may interfere to protect property where there is any danger of its being destroyed (*Hilton v. Earl of Granville*, Cr. & Ph. 292). When there is a substantial question to be decided the Court should interfere (per Lord Cottenham, *Great Western Railway Company v. Birmingham and Oxford Railway Company* 2 Ib. 602). The point is not whether the question should be decided at the hearing, but whether the nature and the difficulties of the question before the Court are such that the injunction should be granted until the time for deciding the case shall arrive (*Walker v. Jones*, L. R. 1, P. C. 61). Even after dissolution, so long as the property of the retiring partner is made use of in the working of the concern, he has a right to share in the profits (*Featherstonhaugh v. Fenwick*, 17 Ves. 307; *Crawshay v. Collins*, 15 Ves. 227; *Peacock v. Peacock*, 16 Ves. 56).

COCKLE, C. J. I cannot shut my mind to the arguments used by the learned counsel for the defendants, and I am fully sensible at the same time of the force of Mr. Blake's remarks. It is difficult for me to decide when a case is so argued. But, at the same time, without being able to say "I dissolve this injunction on such and such a ground," yet, looking at the whole of the facts, I feel irresistibly drawn to a conclusion unfavourable to a continuance of the injunction. No doubt I shall find the cases which have been cited extremely useful as a collection of the cases on the point, yet I cannot help seeing that the word "mine" bears out here a very different interpretation to what it does at home, where a mine might be supported with great capital, and might have a considerable portion of

fixed machinery in it. Out here the word "mine" conveys a very different meaning. I feel compelled to dissolve the injunction with costs.

COOPER v. THE QUEENSLAND DAILY GUARDIAN

Motion for dissolution of injunction granted.

Solicitor for the plaintiff: *J. F. Garrick.*

Solicitor for the defendants: *Macalister.*

COOPER *v.* THE *QUEENSLAND DAILY GUARDIAN.*

[IN BANCO]. 1868. *18th May.*

Cockle, C.J. Lutwyche, J.

Action for Libel—Publication of report of proceedings.

An application for an order to forbid the publication of a report of the proceedings in a demurrer to a plea to an action for libel, as being likely to prejudice the plaintiff before the trial of the action, was refused.

APPLICATION by the plaintiff for an order restraining the publication of a report of the hearing of a demurrer to a plea of justification in an action for libel.

In this action Cooper sued the *Queensland Daily Guardian* for libel. The defendant pleaded justification, to which plea the plaintiff demurred.

Blake and MacDevitt, for the plaintiff.

Pring, A. G., and Lilley, Q. C., for the defendant.

Blake applied for an order to prevent a report of the proceedings being published in the newspapers, and submitted that the hearing of the demurrer being a preliminary matter to the adjudication on the case and the finding of a jury, the publication of the facts of the case as set forth in the pleadings before the adjudication might have a prejudical effect on the plaintiff.

COCKLE, C. J. I never heard of a Judge prohibiting the publication of the proceedings of a trial. There is no precedent for the course proposed.

LUTWYCHE, J. It has been laid down that it is unquestionable law that a faithful report of the proceedings of the Court is legal and justifiable. This is a point of law, and I cannot see how the Court can prevent the publication of a faithful report.

CORFIELD v. GROUNDWATER.

COCKLE, C. J. The judgment upon this will be a precedent, and a precedent is part of the law. The public are entitled to know what the judgment is, and the grounds upon which it proceeds. I do not think the application can be granted.

Application refused.

Solicitor for plaintiff: *Garrick.*

Solicitor for defendant: *Murphy.*

CORFIELD *v.* GROUNDWATER.

[IN EQUITY.] 1868. *9th March.* *15th July.* *Cockle, C.J.*

Husband and wife—Ante-nuptial agreement to settle—Post-nuptial settlement—Execution against husband—Equity of wife—Notice—Real Property Act of 1861 (25 Vic., No. 14), ss. 1, 43, 44, 77, 78, 83, 91.

G, previous to his marriage, agreed to settle on his intended wife a sum of money given her by her mother. Some time after the marriage a piece of land was purchased with that money, and her husband executed a settlement in her favour, but the deed was not registered. A judgment was signed in the Supreme Court, and the land in question was sold in execution to the judgment creditor, who had notice of the wife's claim to the land.

Held that the wife's equity must prevail over that of the creditor.

PETITION for a vesting order under s. 49 of *The Trustees and Incapacitated Persons Act of 1867.*

H. C. Corfield, the petitioner, had obtained a judgment and issued execution against Groundwater in the Supreme Court. Under the execution the Sheriff sold all Groundwater's right in certain land at Maryborough, which the petitioner purchased.

It appeared that before his marriage in 1853, Groundwater had written a letter to the mother of his intended wife, in which he undertook that the sum of £250 given her by her mother should remain in her name. The land in question had been bought out of this money, and all the improvements had been similarly paid for. Previous to the purchase Groundwater agreed to settle the land on his wife, and executed a deed of settlement in her favour in May, 1865, but it was not registered prior to the sale by the Sheriff

Corfield had notice before the sale that the land belonged to Mrs. Groundwater. Mrs. Groundwater had sole control over the money until the purchase. Messrs. Keane and Fowles also claimed a lien on the Crown grant.

Harding, for the petitioner, contended that the land being registered in the name of the husband, any claim of his wife would not prevail against that of the petitioner who purchased the land, and was entitled to a conveyance.

Lilley, Q. C., and Griffith, for George and Janet Groundwater, contended that the husband was a trustee for the £250 for his wife, and that the trusts followed and attached to the lands purchased out of the fund. The settlement had been actually made, and the petitioner purchased with notice of the same.

Counsel cited *Parker v. Brooke* (9 Ves., 583); *Pawlett v. Delaval* (2 Ves., Sen., 666); *Newlands v. Paynter* (10 Sim., 377); *Taylor v. Plumer* (3 M. & S., 562); *Chedworth v. Edwards* (8 Ves., 46); *Buckeridge v. Glasse* 1 Cr. & Ph., 126); *Hopper v. Conyers* (L. R., 2 Eq. 549).

Harding, in reply, reviewed the policy of the *Real Property Act of 1861*, citing ss. 1, 43, 44, 77, 78, 83, 91.

C. A. V.

15th July, 1868.

COCKLE, C. J., After a careful consideration of the case, I have decided to dismiss the petition, with costs, as I think the equity of Mrs. Groundwater must prevail over that of the creditor. With regard to the claim of Messrs. Keane and Fowles, I should require further proof as to how the lien arose, and, therefore, reject it and anything arising on it.

Petition dismissed.

Solicitors for petitioner; *Little & Browne.*

Solicitors for respondents: *Keane & Fowles.*

Re BATHO.

[In Banco].
1868.
12th, 22nd May, 5th June.

Cockle, C. J.
Lutwyche, J.

Solicitor—Breach of trust—Suspension.

A solicitor, who had invested money of a client on mortgage, and received the principal and interest from the mortgagor, but never paid the same to the mortgagee, was ordered to pay the principal, interest and taxed costs, and to be suspended from practice until the same was paid.

Application by the Law Society of Queensland to make absolute a rule *nisi*, calling on Henry Batho, of Ipswich, attorney, to pay, on or before 5th June, to Benjamin Durham, the sum of £100, with interest at the rate of 15 per centum, calculated from the 12th April, 1865, and costs, or, in the alternative, to show cause why his name should not be struck off the roll of the Court, and an attachment be issued against him for the recovery of the said sum, with interest and costs.

On the 12th April, 1865, Benjamin Durham, a client of the respondent, placed in his hands a sum of money for investment. Batho invested it on mortgage on Durham's behalf on some land—the deeds of which he held as security. In 1866 he received the sum of £100 and interest from the mortgagor, and released the deeds, but never paid Mr. Durham, or gave any satisfactory information to him on the subject. Durham then brought an action for the recovery of the money and interest.

On 12th May an order was made that Batho be sworn to answer such questions as should be asked of him on his examination in interrogations to be exhibited to him before the Registrar of the Court.

On 22nd May the Registrar made his report, and a rule *nisi* was granted as above, returnable on 5th June.

Griffith moved the rule absolute. He cited *Re Wright* (12 C. B., N. S. 705); *R. v. Warner* (1 H. & C., 636).

Batho, in person, submitted the rule was too harsh. The costs would have to be taxed first. He should be allowed time to pay. He had been driven to such straits for cash that he had applied the £100 to the settlement of his own costs against Durham, instead of paying it over as he ought to have done. The relation was not one of trust, but a simple agency. He asked for lenient treatment.

The Court was of opinion that Batho, being an attorney, and the money being placed in his hands for Durham's use and benefit, it was a trust, and ordered the defendant to pay the principal, interest, and taxed costs of all the proceedings, and to be suspended from practice until the same were paid.

R. *v.* HEENEY, *Ex parte* DAVENPORT.

Mandamus—Crown Lands Alienation Act of 1868 (31 Vic., No. 46), ss. 6, 8, 21, 33, 38, 40, 46, 47—Land Agent—Commissioner—Inferior ministerial officer.

[In Banco]. 1868. *17th June. 1st July.*

Cockle, C. J.

(In Vacation.)

A *mandamus* will not lie to a Land Agent for a refusal to take applications under s. 47 of *The Crown Lands Alienation Act of 1868.*

Application, on behalf of G. H. Davenport, to make absolute a rule *nisi* for a writ of *mandamus* against Francis Xavier Heeney, Land Agent of the district of Toowoomba, commanding him to receive an application tendered to him by the applicant, on the 9th June, 1868, for the conditional purchase of agricultural land in the district of Toowoomba, and to proceed thereon in accordance with the provisions of *The Crown Lands Alienation Act of 1868.*

On the 9th June, 1868, Davenport prepared and executed seven applications, in the form prescribed by clause 46 of *The Crown Lands Alienation Act of 1868*, for the conditional purchase of certain land in the Toowoomba and Warwick Railway Reserve, being portions 13, 14, 15, 16, 19, 20, and 21, of the parish of Tooth, in the county of Aubigny, and situated on the Clifton Run, within the district of the Toowoomba Land Agent, and open for selection by conditional purchasers under sec. 40 of the Act. These applications were forwarded by Davenport to his agent in Toowoomba, J. W. Stable, with instructions to hand them to Francis Xavier Heeney, Land Agent for the Toowoomba district, and to request him to allot to him, Davenport, the land described therein. He forwarded, at the same time, to Stable, transferable land orders, duly available to the amount of £48, to hand to the Land Agent in payment of the sum of £46 18s. 8d., being the amount of the first annual instalment for the conditional purchase of the land; and also the sum of £34 4s. in cash, the amount of survey fees due on the land. On the 9th of June, an office day within the meaning of the Act, and during office hours, Stable, as agent for Davenport, applied on his behalf to the Land Agent for the seven blocks of land abovementioned, amounting altogether to 625 acres 3 roods, portions of agricultural land within the railway reserves, and situated in the district of Toowoomba.

[In Banco].
1868.
12th, 22nd May.
5th June.

Cockle, C. J.
Lutwyche, J.

The rule was granted as against Heeney as a land agent under s. 33 of the Act; Heeney is not an officer against whom a *mandamus* will lie. Land Agents are appointed by the Governor-in-Council, to act on behalf of the Government as their agents or servants, and are subject to Government instructions. They can be removed or suspended by the Governor-in-Council. The Governor-in-Council can throw out Heeney to-morrow, and where would the *mandamus* be then?

[*Lilley Q. C.*: It is against the Land Agent at Toowoomba].

Supposing the Government were to dismiss Heeney and appoint no one else? A Land Agent is an officer at will; if the writ lies against a Land Agent, the Supreme Court can *mandamus* every petty officer in the colony. When the Land Agent refused to receive the applications he stated he was precluded by his instructions from doing so, the land having been surveyed and proclaimed for sale by auction, but subsequently withdrawn under sec. 90 by a properly authorised officer, the Commissioner of the district. The applicant has not attempted to enforce his claim before the properly constituted courts of appeal. Before resorting to the Supreme Court, he should have applied to the Commissioner from whom, if not satisfied, he could have appealed to the Governor-in-Council. (Comyn's Digest, *sub. tit. Mandamus; R. v. Mayor of Stratford on Avon*, 1 Lev. 291; Tapping on Mandamus, pp. 17, 29, 31; *R. v. Justices of Middlesex*, 9 A. & E. 540).

Lilley, Q. C.: The Land Agent is in the same position as an officer of the Court who has refused to issue a writ. The applicant cannot go to the Commissioner or Governor-in-Council until the Land Agent has performed his duty in the way in which it is now being attempted to compel him to do. Unless the machinery of the statute be set in motion the applicant can never reach the ear of the Commissioner, and if he does not do that he can never reach the Governor-in-Council. There are four persons appointed to administer the Act: first the Governor, then the Minister for Lands, then directly Commissioners for the Districts, and Land Agents. Section 33 declares the functions of the Land Agent. He is not a subordinate officer for all purposes, and has powers he can exercise independently of the Commissioner. The 47th section sets out that "applications for the conditional purchase of agricultural land *shall* be received by the Land Agent, and the land at once allotted, subject to such general regulations, &c." The statutory duty is imperative on the Land Agents, and the Government are not able by a subterfuge,

R. *v.* HERNEY, *Ex parte* DAVENPORT.

Cockle, C.J.

such as the removal of a Land Agent for doing his duty, to avoid the directions of this writ. In serving the writ it would be sufficient to direct it to the Land Agent at Toowoomba without specifying the name of the person that held the appointment. Whether the writ will be of any use or not cannot be considered for the purposes of this argument. If there is no Land Agent the writ will be inoperative, but this Court cannot so presume for a single moment. The terms of the statute make it imperative on the Land Agent to receive applications. If it can be shown that under the 47th section there is no land to select, or that there is any rule or regulation which forbids the officer from receiving these applications, that would be an answer to the writ. There is nothing in the statute which shows that the Commissioner has power to command the Land Agent not to receive applications. The Government have power to dismiss the Land Agent; but they cannot compel him not to receive the applications as the Act says he must. The Land Agent therefore is the proper person against whom the writ should issue. (*Comyn*, vol. 5; Tapping, 299, 311; *R. v. Port and Harbour Commissioners of Southampton*, 30 L. J. (Q.B.) 244; *R. v. The Lords Commissioners of the Treasury*, 4 A. & E., 286; *R. v. Lords of the Treasury*, 20 L. J. (Q.B.) 305).

Blake followed, and cited Tapping, pp. 17. 30, 38; *R. v The Bishop of Oxford*, 7 East, 345; ss. 40, 41, 51, 96, and 97 of the Act 31 Vic., No. 46.

COCKLE, C. J. I have consulted with my learned brother Lutwyche, and we think that the proper person against whom the writ should have been applied for is the Commissioner, and therefore we cannot grant a *mandamus*. As no costs were asked for, none will be awarded.

Rule discharged.

R. *v.* REGISTRAR-GENERAL, *Ex parte* ROXBURGH.

1868.
8th July.

Cockle, C. J.
Lutwyche, J.

Real Property Act of 1861 (25 Vic., No. 14), ss. 3, 14, 34, 56, 137—Mortgage—Refusal to register—Mandamus to Registrar-General—Ministerial act—Discretion—Special case.

The duties of the Registrar-General under *The Real Property Act of 1861* are ministerial, not judicial. He cannot refuse to register a deed which substantially conforms to the form required by the Act.

An instrument purporting to be a mortgage was tendered to the Registrar-General for registration, but he, considering it to contain more than one mortgage, declined to register it.

Held that the provisions of s. 56 are mandatory, and that a *mandamus* must be issued to the Registrar-General to register the document.

The circumstances under which a special case should be stated under s. 14 of the Act 25 Vic., No. 14 considered.

APPLICATION on behalf of Messrs. Roxburgh, Beit, and A. Hodgson, executors in the estate of J. D. McLean, to make absolute a rule *nisi* for a writ of *mandamus* calling on the Registrar-General to show cause why he should not register a certain mortgage executed by C H. Green, of Goomburra, in favour of the applicants, in consideration of having received from the applicants a sum of £23,827 14s. 2d., and from A. Hodgson alone a sum of £23,827 14s. 2d.

Lilley Q. C., and Harding, moved the rule absolute.

Pring, A, G., shewed cause. Section 56 of *The Real Property Act of 1861* is directory and not mandatory [Lutwyche, J. referred to *The Acts Shortening Act*]. In s. 14 the Registrar has a directory power. The document was not a bill of mortgage (*R. v. Bank of England*, 2 Doug. 524). Where another specific remedy exists, *mandamus* will not lie. The Registrar could have been sued for misfeasance. The whole Act shows that the Registrar has discretionary powers vested in him, which he exercises at his risk, for if it is proved that he does wrong, damages can be obtained from the Assurance fund. If the applicants have lost priority through the registration of a second mortgage, and that through the wilful default of the Registrar, they can bring an action (*Bush v. Beavan*, 32 L. J., Ex. 54, 1 H. & C. 500).

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LUTWYCHE, J. I consider s. 56 mandatory. The only question is whether the instrument is a bill of mortgage or not. I agree with the authorities which lay down that a *mandamus* will not lie where another equally efficacious and specific remedy is provided, but, I confess I do not see that provided in the statute. The Registrar-General might have cleared himself of the difficulty by submitting a special case.

COCKLE, C. J. I am not at all sure that the full meaning of the section (s. 14), authorising a special case to be stated, has been fully brought out. I do not take it that the Court is to sit as a mere deputy Master of Titles, and give an opinion upon any title the Registrar-General may choose to send up. The probable meaning is that if a special case were stated in the same form as any other special case, signed by the parties to be bound by it, and by the Registrar-General also, then if the Court saw all the persons interested, or parties in the case, before them, it would hear the case and pronounce a decision.

LUTWYCHE, J. Before a special case can be stated, the Registrar must come before the Court and say "These are the facts which I show you upon affidavit; Will you order a special case to be stated?" The Judge will then exercise his discretion as to whether the facts disclose a case which the Court can entertain.

Pring, A. G.: If s. 56 is mandatory, the Registrar-General, the moment he receives a bill of mortgage in the form of the schedule, must register it. A great deal has to be filled in.

COCKLE, C. J. He is limited to a certain extent by the form given in the Act.

Pring, A. G.: The mortgage was not in form F. Two mortgages were included in one deed, and it was sought to register them as one mortgage. The mortgagor could not produce the certificate of title in favour of both parties, and so it was impossible to say which had priority. The covenants were distinct.

LUTWYCHE, J. Might it not have happened that when the executors of McLean were applied to they had expressed their willingness to advance half the money, and might not Hodgson have offered to advance the remainder, not as a second mortgage, but on condition that the land became security for the whole amount?

Pring, A. G.: The instrument does not show that. The two transactions could not be endorsed as one incumbrance. The application should be dismissed with costs.

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Cockle, C. J.

Lilley, Q. C.: The Registrar cannot refuse to register (*R. v. Registrar of Deeds for the County of Middlesex*, 19 L. J., Q. B. 537). The interpretation of the instrument is for the Court There was only one mortgage, though two parties were interested. There is nothing to prevent a man who has twenty creditors entering into a covenant and securing payment to the whole of them, as in a composition deed. As long as the deed which is presented to the Registrar is signed by the person in whom the fee simple of the land is vested, and the form of the instrument substantially complies with the Act, the Registrar is bound to register the deed. If the Registrar exercises his discretionary powers in a manifestly unjust manner the Court will interfere with such discretion. A second mortgage might have been registered. There is no other adequate remedy. The rule should be made absolute with costs.

COCKLE, C. J. When the Court first sat this morning we thought it would be necessary to bestow a much larger amount of study and consideration upon the decision in the present important matter than we think after hearing the arguments there is any necessity to give it. Indeed, the conclusion to which we must come appears to us so obvious that it is unnecessary that any delay should take place in giving it. In the first place, will the *mandamus* lie? It has hardly been contended that the case is removed by any broad lines from the general class of cases in which *mandamuses* have been directed to public officers. But it has been strongly insisted on that there was a remedy equally efficacious and convenient with that by *mandamus*, and that to such remedies the aggrieved person should have recourse. Our attention has been forcibly directed to s. 137 of *The Real Property Act* in which, it was said, it is provided that the Registrar-General might be reached in case of wilful default by him. But the position would certainly be rather a singular one for him to take. On the motion for a *mandamus* he might protect himself by saying it must be proved that he had been guilty of wilful default. That answer would amount to this, that if there had been no wilful default, then there was no remedy by action. If that were so there must be some other remedy, and that remedy would seem to be by a writ of *mandamus*. Assuming that *mandamus* will lie, I can conceive no class of cases in which it is so important to the public mind that it should, as in the case which is now before the Court, in which a sum of nearly £50,000 was imperilled by the delay in the registration of a deed. In this particular case, owing to the known character of

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Cockle, C. J.

all the persons concerned, there is little apprehension of any intermediate mortgage being hurried on to the Registry office; but we cannot assume that in all cases delay will be attended by so little peril. Supposing there had been a contest of creditors or persons who had advanced money, it is very possible that the whole £50,000 might have been lost by a very trifling delay in registration. I know indeed, practically speaking, I do not mean to say in this colony, but in other places, that all due haste is used in the registration of deeds, or the whole property might be imperilled. That being so, the Court cannot conceive that they are exercising any other than a salutary jurisdiction in letting the *mandamus* go. What would be the effect of our refusing? Why, to place the bulk of the property, certainly the bulk of the property depending upon realty, at the absolute discretion of the Registrar-General. Far be it for the Judges to desire to extend unduly the powers of the Courts of Law. If it were the intention of the Legislature of the Colony to transfer the decision of questions of realty to the Registrar-General, I do not know that the Court would make any great objection. It would certainly relieve us of one of the most anxious and difficult classes of cases which come before us, for no class of questions gives me greater trouble than those which are brought before me under *The Real Property Act*; I think I can say the same to some extent of my learned colleague's experience. If, therefore, it becomes the wish of the Legislature, and satisfactory to the public, that the whole disposal of the realty of the country should be left to the Legislature and the Registrar-General, we should cheerfully resign the consideration of all such questions to them. The Court cannot, however, find anything of that kind in the Act. The two clauses which have been most prominently brought before us are mandatory in their provisions. The only suggestion that the clause was not mandatory is the use of the word "may," somewhere about s. 34, where it says that the memorial, and not the mortgage itself, shall contain the precise hour and day of production for the purpose of registration of the instrument, with such other particulars as the Registrar-General may direct. But even the slight effect of that argument is destroyed when we look at the last part of s. 3. Is there anything in the body of the instrument to show that it ought not to be registered? If I understand the argument of my learned friend the Attorney-General aright, he contended, first, that a certain wording should have been given to the instrument, which it is not obvious would have altered its operation, or else that

the mortgage itself should have been divided into two separate mortgages, and each registered separately, so that the enlarged payment of two distinct sets of fees to the Real Property Office might have been made. I presume the revenue of the colony has not suffered, or else some distinct objection would have been taken on that ground. The mere accident that one set of fees less was payable on one form of transaction than another really is hardly sufficient ground to refuse to register, particularly when the amount at stake is considered. It is more reasonable to suppose that the operations of the Registrar-General's Office should be adapted to the transaction of business than that the transaction of business should be adapted to suit the Registrar-General's Office. To construe the deed as containing two separate mortgages would be to alter the transaction altogether The Court think the parties were not bound to a form of deed which should bear a construction such as the Registrar-General thought fit to put upon it, and not the construction which they themselves intended it should bear. Again, the colony would require a very large staff of officers indeed if every document was to be subjected to the amount of study and analysis the present one has undergone. If some creditor, other than Messrs. Beit, Roxburgh, and Hodgson, were contending for priority, and trying to get his deed registered first, I could understand the object and importance of investigating narrowly the contents of the deed. But such does not appear to be the case. On these grounds, therefore, I think the application for a *mandamus* must go.

LUTWYCHE, J. I am of the same opinion. I have previously intimated that I thought s. 56 mandatory in its terms. The only question, it appears to me, is whether the bill of mortgage is such a bill of mortgage as that described in a previous part of the section. First of all it must be executed in Form F, and must contain a statement of the estate and interest intended to be mortgaged. It must refer to the description given in the grant or certificate of title of the land in which such estate or interest is held, or shall give such other description as may be necessary to identify such land, together with a statement of all mortgages, and every encumbrance affecting the same, and must be attested by a witness, and be registered in the order and time in which it is produced to the Registrar-General for that purpose. That, clearly, appears to throw upon the Registrar-General, when these provisions have been complied with, a ministerial, and not a judicial, duty. It was for him to register the instrument; and if

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the parties concerned afterwards came to dispute they could carry their quarrel to the courts of law. It is not for the Registrar-General to take such questions into consideration. No doubt he has been actuated by a laudable anxiety to do his duty; but it must be regretted he should have given himself so much unnecessary trouble. I cannot see why the instrument should not be read and construed as one transaction. Upon the face of it I should take it to be so. Even had there been two separate transactions, distinct in point of time, I see no reason why the deed should not embrace both. Separate rights are not lost or affected by taking a joint security. If a party agreed to it, who is to hinder him from doing what he conceives to be for his own interest? Deeds of composition and deeds of assignments are familiar illustrations of that mode of proceeding. I see no reason why persons should be prevented from acting in that way, for there are not many in the colony who could advance such large sums as £50,000 on station property; but two or three small capitalists, by combining in that way, might do it. It would fetter a very large number of persons engaged in business if the Court held that such kind of instruments should not operate. The intention of the mortgagees appeared that they should stand in *pari passu* in relation to the security, neither seeking to get a priority one before the other. If, in the not impossible event of a large claim coming upon the assurance fund in part, and the consolidated revenue in part, there might be an end to the Act. I think, with the Chief Justice, that the rule for a *mandamus* must be made absolute, without costs.

Rule made absolute.

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CONTRACT—*Conditions rendered impossible by act of law.* Where a condition in a contract, made after the passing of an Act of Parliament and the issue of a proclamation thereunder, is thereby rendered impossible of performance, the non-performance of the condition is not thereby excused.

Melville v. De Wolf (4 E. & B., 844) discussed and distinguished.

Sale of cattle — Delivery—Time of Payment — Promissory note—Credit — Damages for breach. By an agreement, dated 15th August, 1865, the defendant agreed to sell, and the plaintiff to buy, 1,200 head of cattle, £4 per head for bullocks, and £3 for cows, the cattle to be delivered at C, approval being taken on the station in monthly drafts of 100 head, more or less, delivery to commence early in December, 1865, on a day to be agreed upon, and to continue over twelve months, payment to be made by approved endorsed bills at three months, dated from the day of delivery.

As plaintiff did not give defendant an approved indorsed bill when demanded on 15th February, defendant refused to deliver any more cattle.

A draft of 100 were delivered on the 4th February, and payment made for the same on 22nd February.

Upon an action for breach of the agreement, Lutwyche, J., directed the jury that payment was to be made at C; that payment and delivery were not concurrent acts; that delivery was to precede payment; that payment was to be made to defendant, wherever he happened to be, or his authorised agent; and that the time of payment was three months after delivery at C.

Held, that the defendant was not entitled to avoid the contract, and that the plaintiff was entitled to damages, including his expenses incurred in going for delivery which was refused.

Held, also, that where an agreement is made that a bill at a certain date should be given in payment for goods, that agreement operates as a giving of credit, and debars the seller from suing for goods sold and delivered before the period when the bill, if given, would have become due.

CORPORATION—*Wrongful dismissal—Contract—Want of consideration—Indebitatus count—Contract with Corporation not under seal.* Where a plaintiff claimed damages for wrongful dismissal from the office of architect and surveyor to a Municipal Council, and by the by-laws of the Council all permanent appointments were to be made by a majority of votes of the Council, and the salary and remuneration to be fixed for that municipal year, the plaintiff, having failed to prove willingness to accept any remuneration the Council might fix, was non-suited.

EXECUTION—*28 Vic., No. 13, ss. 38, 43—3 Vic., No. 18, s. 1—25 Vic., No. 14—Fi. fa.—Direction to levy on goods and chattels only.* A writ directing the Sheriff to levy upon goods and chattels does not authorise him, in virtue of section 38 of 25 Vic., No. 13, to levy upon lands. A levy and sale by the Sheriff is not of the less effect, by reason only of its having taken place before a memorial of the writ was, under section 91 of 25 Vic., No. 14, entered on the register book.

Ex parte THE BANK OF AUSTRALASIA. *In re* THE REGISTRAR-GENERAL AND THE MASTER OF TITLES (Cockle, C. J., Lutwyche, J.) 126

On Foreign Judgments, Summons for
See FOREIGN JUDGMENT 28

EXECUTOR—*Judgment against heir-at-law as executor*
See HEIR-AT-LAW—REAL PROPERTY 97

EXPRESS STIPULATION—
See CARRIER 113

EXTRADITION—
See ARREST 1

FALSE PRETENCES—
See CRIMINAL LAW 109

FELONIOUS INTENT—
See CRIMINAL LAW 135

FI. FA.—
See EXECUTION 126

FOREIGN CREDITORS—
See COMPANY 159

FOREIGN JUDGMENT—*Summons for issue of execution on memorial of foreign judgment—Right of defendant to impeach judgment after memorial filed—19 Vic., No. 12, s. 3—20 Vic., No. 25, s. 13.* On the return of a summons under 19 Vic., No. 12, s. 3, founded on a memorial of a judgment of New South Wales, calling on a defendant to show cause why execution should not issue in the Supreme Court of Queensland upon such judgment, the defendant filed an affidavit stating that he had never been served with the writ in the action, either personally or by its having been left at any residence occupied by him.

Held, that a memorial of a foreign judgment is only *primâ facie* evidence that the judgment was obtained in due course of law; that any defence which a defendant might plead on an action of debt on a foreign judgment will be a good answer to an application for the issue of execution under s. 3 of the Act 19 Vic., No. 12; and that, as the evidence adduced by the defendant raised reasonable doubts as to whether he had received proper notice of the proceedings in the action, the plaintiff was not entitled to the summary relief asked for, which should only be granted in very clear cases.

BARKER *v.* JOHNSON (Lutwyche, J.) 28

FRAUDULENT PREFERENCE—
See INSOLVENCY 72

FRAUDS—*Statute of*
See INSOLVENCY 91
Constructive
See INSOLVENCY 149

INSOLVENCY—*Advertisement in Government Gazette—5 Vic., No. 17, ss. 12, 34 — Payment without notice of sequestration.* The publication of a sequestration order in the *Government Gazette* is not a notice of insolvency to all the world.

In re MORTON, *Ex parte* GRAY 16

Costs — Petition for sequestration — Dismissal of petition — 5 Vic., No. 17, ss. 13. 16, 17 — History of doctrine of rights of parties to costs. A petition had been filed for the compulsory sequestration of the estate of B, and dismissed with costs, to be taxed in favour of B. and the creditors who shewed cause against the sequestration.

Held, that the costs should be taxed as between party and party.

If the remedy sought in the Insolvency jurisdiction of the Court is of an equitable nature, costs should be given in accordance with the rules laid down by the Courts of Equity. If the remedy be a legal one, costs should be awarded as at law.

In re BIRKMAN, *Ex parte* PICKERING (Lutwyche, J.) 14

Deed of composition—Stay of proceedings—Secured creditors—Majority of creditors — Insolvency Act of 1864 (28 Vic., No., 25) s. 129 — In ascertaining whether a deed of composition has been executed by a majority of creditors, all the creditors must be taken into account, whether or not they have security for their claims, and, in the case of secured creditors, to the full amount of their claims.

In re CRIBB, *Ex parte* CRIBB (Lutwyche, J.)... 162

Equitable assignment of money to be acquired in futuro—Insolvency of assignor — 28 Vic., No. 25, s. 100. In equity an assignment may be made of money to be subsequently acquired, and, if made for a valuable consideration, such an assignment will prevail over the claim of the Official Assignee in the event of the assignor becoming insolvent.

C., as security for advances made by a bank, directed, in writing, the Immigration Agent to pay the bank all moneys due or to become due to him. The bank made advances and received payments from time to time. C. became insolvent, and the balance due to him was paid to the Official Assignee.

Held, that there had been an equitable assignment which operated on the money as it became due, and that the bank were entitled to the balance.

Holroyd v. Marshall (33 L.J., Ch., 193) followed.

Re COSTIN, *Ex parte* COMMERCIAL BANKING CO. OF SYDNEY (Lutwyche, J.) 153

Fraudulent preference—"Alienation or transfer"—Conveyance without consideration made within twelve months of sequestration—Alien—Conveyance by alien after marriage in pursuance of verbal articles made before marriage—Wife's equity to a settlement—Promise not in writing—Agreement taken out of the Statute of Frauds by part performance—5 Vic , No. 17, sec. 7—Statute of Uses (27 Hen. VIII, c. 10). D., an alien, prior to his marriage with S., agreed by verbal articles to settle on her and the children by her former marriage the proceeds of the intestate estate of her late husband, and after marriage failed to do so; but the moneys of the intestate were treated as belonging to his wife, and were expended by her on certain real estate purchased for her absolutely, and in the indenture of purchase therefor her husband joined. A mistake having been made in the legal form of the deeds, an instrument of trust was prepared on May 17th, 1862, by D. alone, whereby D. granted and released unto the trustees the land in question, to hold the same unto the said trustees and their heirs, to the use of his wife for her life, remain-

RIGHT OF ACTION—*Action for damages arising from action of public officer—Officer acting in judicial or ministerial capacity—Want of jurisdiction—Malice—Judicial notice—Duty of officer, how pleaded.* An action will not lie against any public officer in respect of any undertaking or agreement made by him in his public and official character, even if he contract under seal.

Public officers acting in a judicial capacity are not responsible in damages for an injury to an individual resulting from an act of omission or commission on their part, unless they act advisedly without jurisdiction, or with malice.

Where the duty of a public officer is purely ministerial, an action will lie against him for particular damage occasioned to an individual by a breach of such duty.

FITZGERALD *v.* BOYLE (Lutwyche, J.) 19

SALE OF GOODS—*Liability of Auctioneer—Set-off by third person—Mutual credit—Assignment of a chose in action—5 Vic., No. 9, s. 27—6 Geo. IV, c. 16, s. 63.* C., an auctioneer, was employed to sell certain goods for R. C. & Co., who subsequently executed a deed of assignment to plaintiffs under 5 Vic., No. 9. Before the assignment C. sold some of the goods to C. & F. who claimed to set-off the value of the goods against a debt due to them by R. C. & Co. To an action by plaintiffs against C. for breach of duty in failing to account for these goods or their proceeds, C. pleaded the set-off claimed by C. & F.

Held, that it is the duty of an auctioneer, in the absence of a stipulation to the contrary, to sell for cash, and his liability to his employers is not affected by the fact that the goods are sold to a person to whom the employer is indebted at the time of the sale, and that the plea was bad.

An equitable set-off, independently of the statutes of set-off, only arises where there is a mutual credit between the parties.

Williams v. Millington, (1 H. Bl. 81) followed.

Bulgin v. McCabe, 3rd September, 1859, distinguished.

KNOX *v.* COCKBURN (Lutwyche, J.) 80

Defect of title—Misrepresentation—Voluntary settlement—Advancement to son—Remedy at law—Rescission. H purchased two allotments of land, one in his own name, and the other in that of his infant son. He then sold the land, and agreed to sign a conveyance of the same, to be prepared by the vendee. The vendee paid the money, entered into possession, and died before a conveyance was executed.

The vendee's executors filed a bill to declare the agreement void, and for a decree for the return of the purchase money with interest; and charged the defendant with fraud and misrepresentation in being aware of his inability to make a good title.

SALE OF LAND—*Continued.*

Held, that the purchase of the allotment in the name of his son was, in the absence of evidence to the contrary, to be deemed an advancement to such son.

A good title means such a title as a court of equity will compel a purchaser to accept. A purchaser will not be compelled to take a title to land which has, prior to the sale to him, been made the subject of a voluntary settlement by the vendor.

In the event of a vendor proving not to have a good title to land, the consequent breach of a contract by him for the sale of such land does not amount to constructive fraud, and the vendee's remedy is by action-at-law and not in equity.

Smith v. Garland (2 Mer. 123); and *Sainsbury v. Jones* (5 My. & C. 1), followed.

Devoy v. Devoy (26 L. J. Ch. 290), discussed.

Barton v. Van Heythusen (11 Hare, 8, 126), distinguished.

SOLICITOR—*Breach of trust —Suspension.* A solicitor, who had invested money of a client on mortgage, and received the principal and interest from the mortgagor, but never paid the same to the mortgagee, was ordered to pay the principal, interest, and taxed costs, and to be suspended from practice until the same was paid.

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